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No. .....

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In The

Supreme Court of the United States

October Term, 1984

JOE E. LUTJEHARMS, Commissioner of Education, *et al.*,

Petitioners,

vs.

GEORGE ROSE, as next friend of MARLA ROSE,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL NO. 80-0-164

James J. Monahan, as next friend of Daniel J. Monahan, and George Rose, as next friend of Marla Rose,

Plaintiffs,

vs.

State of Nebraska; Charles Thone, Governor of the State of Nebraska; Board of Education, School District #1, Douglas County, Nebraska; Owen Knutzen, Individually, and as Superintendent of the School District #1, Douglas County, Nebraska; Dale Samuelson, Individually and as Assistant Superintendent in Charge of Special Education of School District #1, Douglas County, Nebraska; Anne Campbell, Commissioner of Education for the State of Nebraska; State Board of Education, Walter M. Thompson, Individually, and as a Member of the State Board of Education; Margaret Lockwood, Individually, and as a Member of the State Board of Education; Frank E. Landis, Individually, and as a Member of the State Board of Education; Don M. Lienemann, Individually, and as a Member of the State Board of Education, Dorothy Creigh, Individually, and as a Member of the State Board of Education; Arlene E. Hart, Individually, and as a Member of the State Board of Education; William C. Ramsey, Individually, and as a Member of the State Board of Education; Dorothy Beaver, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; June Bostwick, Individually and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; Walter Calinger, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; Pat Geringer, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; Leo Hoffman, In-

dividually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; Gaynelle Goodrich, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; Ruth Thomas, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; Frank Bogard, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; Ron McGruder, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; James A. Monaghan, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; James Beutel, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; and Leo Kastrick, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska,

Defendants.

MEMORANDUM

(Filed May 16, 1980)

APPEARANCES:

For Plaintiff, Monahan—Mino St. Lucas, Omaha, Nebraska.

For Plaintiff, Rose—Quintin S. Hughes, Bellevue, Nebraska.

For Defendants—Harold Mosher, Asst. Attorney-General, State of Nebraska, Lincoln, Nebraska; John P. Heil, Omaha, Nebraska.

DENNEY, District Judge

Under the Education of All Handicapped Children Act of 1975, states which accept federal assistance for the education of the handicapped are required to provide the parents of handicapped children with certain procedural safeguards. Included among these safeguards is the requirement that a person aggrieved by the educational placement of a handicapped child "shall have an oppor-

tunity for an impartial due process hearing" to determine the propriety of the school district's placement of the child. 20 U.S.C. § 1415(b) (2).

The primary issue raised by the plaintiffs' complaint is whether Nebraska statutory law conforms with the procedural requirements of the federal act. This issue focuses on L.B. 871, which was enacted by the Nebraska Unicameral in an effort to comply with the procedures outlined in the Act. *See* L.B. 871, §§ 4-11, 1978 Neb. Laws 887-89 (codified in Neb.Rev.Stat. §§ 43-661 *et seq.*). The plaintiffs contend that L.B. 871 is not consistent with federal law because the Nebraska statute fails to provide parents with an impartial due process hearing. Specifically, the plaintiffs allege that the power of the State Commissioner of Education under L.B. 871 to review the decision made in a due process hearing prevents such hearings from being impartial under federal law.

The matter presently before the Court is the plaintiffs' request for a preliminary injunction.

Much of the preliminary relief sought by the plaintiffs is apparently designed to protect those persons whom the plaintiffs wish to represent through a class action suit. To date, the plaintiffs have not requested that this Court certify this lawsuit as a class action. Without class action certification, the Court cannot grant the plaintiffs' request for an injunction to protect persons not presently before the Court. Thus, the Court shall deny plaintiffs' request for a preliminary injunction to the extent that the request seeks protection for persons not named in this lawsuit.

With respect to the named plaintiffs, the Court shall consider the merits of the plaintiffs' request for a prelim-

inary injunction. The following discussion constitutes this Court's findings of fact and conclusions of law on this issue. However, any legal or factual determination reached herein is made solely for the purpose of resolving the issue of whether the plaintiffs are entitled to preliminary relief. Such determinations do not constitute a final decision on the merits of plaintiffs' complaint.

I.

The law governing the educational right of handicapped children is a hybrid, whose elements are found in both federal and state statutory law. A brief review of these statutes will aid in understanding the factual setting of this case.

The principal federal statute involved in the instant case is the Education of All Handicapped Children Act of 1975 [the Act]. 20 U.S.C. § 1401 *et seq.* The Act is essentially a funding statute through which the federal government provides financial assistance to the states for the education of handicapped children. A state, however, is not entitled to receive these funds unless it fulfills certain prerequisites.

Among the prerequisites to funding is the requirement that the state provide procedural safeguards to protect the educational rights of handicapped children. The Act does not specifically mandate the procedural format which must be adopted by a state in order to qualify for funding. The Act, however, does require that the state procedure provide certain minimum safeguards. Within the limits of these minimum standards, the state may adopt a procedural structure suited to its needs and particular institutional setting.

For the purposes of this opinion, the minimum safeguards required by the Act may be summarized as follows. The parents of a handicapped child must be given prior written notice of any proposed change in the educational placement of their child. 20 U.S.C. § 1415(b) (1) (C). If at any time the parents become dissatisfied with any matter relating to the educational placement of their child, they must be given an opportunity to present such complaints. 20 U.S.C. § 1415(b) (1) (E). Once a complaint is filed, the state procedure must provide the parents with an opportunity for an impartial due process hearing. These due process hearing may be held at either the state or local level, whichever is specified in the state law. 20 U.S.C. § 1415(b) (2). The Act, however, does specifically require that "[n]o hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child." 20 U.S.C. § 1415(b) (2). Any decision made in an impartial hearing held at the state level is final except for judicial review of such decision in a court of competent jurisdiction. 20 U.S.C. § 1415(e)(1).

In response to this federal legislation, the Nebraska Unicameral enacted L.B. 871, which created a procedural framework designed to make Nebraska eligible for funding under the Act. *Nebraska Legislative Floor Debate on L.B. 871*, 85th Legis. 2d Sess. 08706, 09246 (1978) (statements of Senator Koch). The procedure adopted by the Unicameral permits the parent of a handicapped child to initiate a hearing on matters related to the child's placement. NEB.REV.STAT. § 43-661 (Reissue 1978). These hearings are conducted at the state level by the Nebraska Department of Education, using hearing officers. Under the Nebraska statute, the hearing officer is required to

make a hearing report containing a decision based on the officer's factual findings. NEB.REV.STAT. § 43-662. Upon receipt of the hearing officer's report, the state statute directs that the Commissioner of Education, after reviewing the report, "shall then recommend or direct such action as may be necessary." NEB.REV.STAT. § 43-662.

The preceding discussion summarizes the state and federal law involved in this litigation. The next matter which must be considered is the specific factual setting of each plaintiff's claim.

II.

Plaintiff Rose

Plaintiff, George Rose, is the father of Marla Rose, a multi-handicapped child. Prior to the 1978-79 school year, Marla attended classes at Beveridge Junior High School. This school is part of the Omaha School District, a defendant in this action. While attending Beveridge, Marla's school day was divided between special education classes and regular classes. Thus, at Beveridge, she was able to interact with non-handicapped children of her own age group during the course of a normal school day.

In June of 1978, the Roses received written notice from the Omaha School District of a proposed change in Marla's educational placement. The district's proposed change would have placed Marla in the Nebraska School for the Deaf on a residential basis. This change was motivated by the district's assessment that the Beveridge placement no longer provided Marla with an appropriate education. At Beveridge, Marla had been educated by the oral method of instruction. However, the district concluded that Marla was not making any progress under the oral method. The

district, therefore, decided that Marla should be assigned an educational placement in which she would receive instruction under both the oral method and the manual method of instruction. The only facility equipped to teach both these methods to a person of Marla's age was the Nebraska School for the Deaf.

After receiving notice of this proposed change of placement, Marla's parents informed the local school authorities of their objections to this change. The Omaha School District, however, refused to withdraw the proposal. Confronted with this refusal, the Roses made a written request for an impartial due process hearing. This hearing was to be conducted by the State Department of Education, pursuant to Neb.Rev.Stat. § 43-661 *et seq.*

The Roses' request for a hearing was made on August 14, 1978. Following several continuances, the hearing was completed on March 23, 1979. A transcript of the hearing was prepared and the parties were given an opportunity to submit final written arguments. Upon receipt of the final arguments, the hearing officer prepared his report, which was delivered to the Commissioner of Education on May 16, 1979. In this report, the hearing officer recommended that the Roses' appeal be dismissed because the school district's proposed placement in the Nebraska School for the Deaf would provide Marla with an appropriate education [Exhibit #5]. Finally, on June 1, 1979, the Commissioner of Education, a defendant in this action, signed the final decision and order in the Rose case. The Commissioner's decision adopted verbatim the report of the hearing officer, and dismissed Rose's appeal based on that report [Exhibit #1].

Despite the Commissioner's decision, Marla's parents still refused to accept the school district's proposed placement in the Nebraska School for the Deaf. Thus, on June 28, 1979, George Rose filed a *pro se* complaint in this Court seeking a judicial review of the Commissioner's decision [CV 79-0-300]. The parties to that case entered into a stipulation in which they agreed that Marla should attend Monroe Junior High School during the pendency of CV 79-0-300. In essence, the stipulation was designed to insure that Marla would receive the same type of education she had received at Beveridge, except that the program would be located at Monroe [Exhibit #6]. It is clear from testimony of the parties and stipulation itself that neither the school district nor George Rose believed that this temporary placement would provide Marla with an appropriate education. The purpose of the stipulation was merely to maintain the status quo during the litigation, as required by 20 U.S.C. § 1415(e)(3).

Notwithstanding the stipulation of the parties, Marla's temporary placement at Monroe was terminated two weeks after its implementation. This termination was precipitated by the Roses' belief that the school district had unilaterally increased the special education component of Marla's placement. Following Marla's removal from Monroe, she was enrolled in the Baptist School, where she has remained ever since.

The Baptist School is not staffed by accredited teachers, nor has it received state accreditation. More importantly, it appears that Marla is not receiving any special education at the Baptist School. The parties, thus, agree that the Baptist School is not an appropriate educational placement for a person with Marla's handicap.

With respect to CV 79-0-300, it should be noted that that case was dismissed on November 29, 1979. Subsequently, on February 2, 1980, Mr. Rose filed a second lawsuit [CV 80-0-67], again seeking judicial review of the Commissioner's decision. This second suit is still pending before this Court. The ir ant action was filed on March 6, 1980, and is based on essentially the same allegations made in the prior suits.

Plaintiff Monahan

Plaintiff, James H. Monahan, is the father of Daniel J. Monahan, a multi-handicapped child. From 1972 until the spring of 1979, Daniel attended the Madonna School, a private elementary school for the mentally retarded. Initially, the cost of Daniel's education at Madonna was paid by his parents. However, his tuition during his last three years at Madonna was paid by the Omaha School District under a contract with the school.

In the spring of 1979, Daniel became confined to a wheel chair. This change in his physical condition necessitated a change in his educational placement, since the Madonna School was not equipped to educate mentally retarded students who were wheel chair bound. Thus, Daniel was forced to leave the Madonna School in June of 1979.

Responding to these developments, Daniel's father contacted the Millard School District and requested that the district recommend a new educational placement for Daniel. The Millard District performed a new evaluation of Daniel, and recommended that he be placed in the development center at George Norris Elementary School, a part of the Millard School District.

Armed with the Millard School District's recommendation, Monahan then sought the Omaha School District's approval of the George Norris placement. This request for approval was initially made to Dr. Samuelson, Assistant Superintendent of Special Education for the Omaha School District and a defendant in this action. Dr. Samuelson, however, refused to give Monahan the unqualified approval he desired. Through Samuelson, the Omaha School District apparently agreed to permit Daniel to attend George Norris, but refused to pay the costs of such placement. This refusal to finance the George Norris placement was based on Dr. Samuelson's determination that the Omaha District's own Hartman Elementary School could provide Daniel with the same education as George Norris. Given the availability of the Hartman placement, the Omaha School District refused to finance Daniel's education in a school located in another district.

Monahan was not satisfied with Dr. Samuelson's decision. Thus, in August of 1979, he took his request for funding to Dr. Owen Knutzen, Superintendent of the Omaha School District and a defendant in this action. Dr. Knutzen, however, refused to alter the prior determination of Dr. Samuelson.

Despite the school district's refusal to finance the George Norris placement, Daniel did begin attending classes at the Millard school in August of 1979. The cost of Daniel's education is presently being paid by his father, and amounts to approximately Seven Thousand Dollars per year.

Following Dr. Knutzen's decision not to alter the determination of Dr. Samuelson, Monahan sought funding directly from the Omaha School District's Board of Edu-

cation, a defendant in this action. However, in January of 1980, the Board refused to review Dr. Knutzen's decision.

Unlike plaintiff Rose, Monahan never attempted to have the school dictrict's decision reviewed by an impartial due process hearing at the state level. This decision not to request a hearing was based on Monahan's belief that he could not receive an impartial hearing under Nebraska law. Thus, after the school board's decision in January of 1980, Monahan filed suit in this Court without seeking administrative relief pursuant to Nebraska law.

III.

Before considering the merits of the plaintiffs' request for a preliminary injunction, the Court must consider a number of procedural issues raised by the defendants' briefs.

Statute of Limitations

The Education of All Handicapped Children Act provides:

> Any party aggrieved by the findings and decision made . . . [in the due process hearing] . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.
>
> 20 U.S.C. § 1415(e)(2).

This statute creates a federal cause of action which is not restricted by any federal statute of limitations. When a federal statute creates a cause of action without a limitation period, the Court must apply the most analogous state statute of limitations in determining whether a cause of action under the federal statute has been timely brought.

The defendants in the instant action contend that Rose's claim under 20 U.S.C. § 1415(e)(2) is barred by the statute of limitations found in NEB.REV.STAT. § 84-917(2) (Reissue 1976). This contention is founded on the defendants' interpretation of the Nebraska law governing judicial review of educational placement decisions. Under Nebraska law, an order of the Commissioner of Education following a due process hearing is subject to judicial review. NEB.REV.STAT. § 43-666. The scope and nature of this review is governed by Nebraska's administrative procedure law. This law requires that a person seeking judicial review of an agency order must file suit within thirty days of the agency's decision. NEB.REV. STAT. § 84-917(2). Based on these statutes, the defendants argue that Rose's claim under 20 U.S.C. § 1415(e)(2) could have been brought in state court under NEB.REV. STAT. § 43-666, and that therefore the most analogous state statute of limitations is the thirty day limitation period governing suits under NEB.REV.STAT. § 43-666. Thus, the defendants conclude that Rose's claim under 20 U.S.C. § 1415(e)(2) is barred since the instant action was not filed within thirty days of the Commissioner's order dismissing Rose's appeal.

Federal courts have not developed a uniform analytical approach for determining the most analogous state statute of limitations. *See generally Clark v. Mann,* 562

F.2d 1104, 1111-12 (8th Cir. 1977); *Chambers v. Omaha Public School District,* 536 F.2d 222, 226-27 (8th Cir. 1977). The case law, however, suggests that the selection of an appropriate limitations period often depends on two separate factors. First, a determination is made as to whether the allegations constituting the plaintiffs' federal claim state a cause of action under state law. *See Green v. Ten Eyck,* 572 F.2d 1233, 1237-39 (8th Cir. 1978); *Warren v. Norman Realty Co.,* 513 F.2d 730, 734 (8th Cir. 1975), *cert. denied* 423 U.S. 855 (1975). However a determination that the plaintiff's federal claim also states a cause of action under state law does not require that the federal court automatically adopt the limitations period governing the state cause of action. Rather, the court must next consider the nature of the judicial proceedings involved in the state court. Thus, once a state cause of action similar to the plaintiffs' federal claim is found to exist, the next issue is whether the state judicial proceedings available to a plaintiff asserting the state cause of action are equivalent to the federal judicial proceeding available to a plaintiff asserting the federal claim. If the state and federal proceedings are not similar, then the limitations period applicable to the state proceedings should not be applied to the federal claim. *See Warren v. Norman Realty, supra,* 513 F.2d at 735; *Waters v. Wisconsin Steel Works of International Harvester Company,* 427 F.2d 476, 488 (7th Cir. 1970), *cert. denied,* 400 U.S. 911 (1970); *Metcalf v. Omaha Steel Castings Co.,* 476 F.Supp. 870, 872 (D. Neb. 1979), *Smith v. Perkin-Elmer Corp.,* 373 F.Supp. 930, 936 (D. Conn. 1973).

In applying these factors to the instant case, the Court will assume that the defendants are correct in asserting that Rose's claim under 20 U.S.C. § 1415 states a cause

of action under NEB.REV.STAT. § 43-666. The Court, however, still must determine whether the state and federal proceedings in issue here are sufficiently analogous to justify application of § 43-666's limitation period to Rose's federal claim. For the reasons discussed below, the Court finds that they are not analogous.

The scope of the judicial proceedings available to a plaintiff under NEB.REV.STAT. § 43-666 is limited. See NEB.REV.STAT. § 84-917 to 919. In essence, a party suing under the provision is only entitled to a limited judicial review of the administrative record. The parties to such a proceeding may not request that the court consider any evidence not contained in the administrative record. NEB. REV.STAT. § 84-917(5). More importantly, the reviewing court does not have the authority to make an independent *factual* determination based on the administrative record, but is limited to determining whether the agency decision is based on substantial evidence or is arbitrary and capricious. NEB.REV.STAT. § 84-917(6)(e),(f).[1] In other words, a party suing under NEB.REV.STAT. § 43-666 is *not* entitled to a trial *de novo* of the factual issues decided by the Commissioner's order. *See 20's Inc. v. Nebraska Liquor Control Commission*, 190 Neb. 761, 763-766, 212 N.W.2d 344, 346-47 (1973).

In stark contrast to the limited review available under NEB.REV.STAT. § 43-666 is the broad scope of the Court's authority under 20 U.S.C. § 1415(e)(2). Any party involved in a § 1415 action is entitled to present evidence

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[1] The reviewing court, however, can make independent determinations of questions of law. NEB. REV. STAT. § 84-917(6) (a) to (d).

not found in the administrative record. 20 U.S.C. § 1415 (e)(2). Moreover, this federal statute requires that the reviewing court make an independent decision based on a preponderance of all the evidence. 20 U.S.C. § 1415(e)(2). *See Joint Explanatory Statement of the Committee of Conference,* S.Rep.No. 94-455, 94 Cong., 1st Sess., at 50, *reprinted in* U.S. Code Cong. and Admin. News, at 1503 (1975). Thus, a suit under § 1415(e)(2) is practically indistinguishable from the normal civil action in which all the issues of the case are tried *de novo.*[2] *See generally Laura M. v. Special School District No. 1,* No. 4-79 Civ. 123, slip op. at 8 (D. Minn. Jan. 21, 1980); *New York State Association of Retarded Children, Inc. v. Carey,* 466 F. Supp. 479, 486 (E.D. N.Y. 1978), *Lora v. Board of Education of City of New York,* 456 F.Supp. 1211, 1227 (E.D. N.Y. 1978).

These distinctions between the state and federal proceedings are determinative of the issue of whether the limitations period governing NEB.REV.STAT. § 43-666 should be applied to a federal suit under 20 U.S.C. § 1415. State statute of limitations designed to govern judicial proceedings in which the court merely reviews the administrative record to determine if the agency decision is supported by substantial evidence should not be applied to federal proceedings in which the court is empowered to make an independent determination based on evidence not

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[2] The legislative history clearly shows that Congress rejected the limited type of review found in NEB. REV. STAT. § 43-666 in favor of the broad review found in 20 U.S.C. § 1415(a) (2). *Joint Explanatory Statement of the Committee of Conference,* S.Rep.No. 94-455, 94 Cong., 1st Sess., at 47-50, *reprinted in* U.S. Code Cong. and Admin. News, at 1500-03 (1975).

found in the administrative record. *See Warren v. Norman Realty Co., supra,* 513 F.2d at 735. This rule is based on the different policy interests involved in setting the limitations period for each of these proceedings. For example, when the judicial review is limited to a review of the administrative record, as it is under NEB.REV.STAT. § 43-666, the plaintiff's burden in preparing his case is not great, since an investigation into evidence not presented at the administrative hearing is unnecessary. The burden on a plaintiff suing under 20 U.S.C. § 1415(e)(2), however, would be greater since, generally, an investigation into additional evidence would not only be appropriate but necessary. This disparity indicates that the policy considerations relevant to setting the limitation period for a § 43-666 suit to have no application to a suit under 20 U.S.C. § 1415(e)(2). *See Waters v. Wisconsin Steel Works of International Harvester Company, supra,* 427 F.2d at 488; *Metcalf v. Omaha Steel Castings Co., supra,* 476 F. Supp. at 872; *Smith v. Perkin-Elmer Corp., supra,* 373 F.Supp. at 936. Thus, the Court finds that the limitations period governing NEB.REV.STAT. § 43-666 does not apply to a federal claim under 20 U.S.C. § 1415, since the judicial review under the state statute is not analogous to the review under 20 U.S.C. § 1415.

This Court is also of the opinion that the thirty day limitation period proffered by the defendants will not best effectuate the federal policy underlying the Education of all Handicapped Children Act. *See Chambers v. Omaha Public School District, supra,* 536 F.2d at 225. One of the Act's goals in providing procedural safeguards is to insure that a child is not placed in an inappropriate educational placement because of an error in his evaluation. *Lora v. Board of Education of City of New York, supra,*

456 F.Supp. at 1227. This purpose will not be served if a parent is given only thirty days within which to assess the validity of the Commissioner's decision.

The parties hae not suggested any other state statute of limitations which should be applied here. The Court, however, notes that there are two Nebraska statutes of limitations which would appear to apply. *See* NEB.REV. STAT. §§ 25-212, 25-219. Under either of these statutes, Rose's claim would have been timely brought. Absent a more appropriate limitations period, the Court finds that Rose's claim is not barred by the statute of limitations.

Rose's Standing to Challenge Statute

The defendants contend that Rose lacks standing under Article III of the United States Constitution to challenge the adequacy of the procedures provided in § 43-662 of the Nebraska Statutes. Under Article III, a plaintiff has standing when "the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26,38 (1976). Applying this standard to the instant case, the Court finds that Rose has standing under Article III to challenge § 43-662 of the Nebraska Statutes.

The Education of All Handicapped Children Act gives the parents of handicapped children a right to an impartial due process hearing on matters relating to the educational placement of their children. Under federal law, any decision made in such a hearing held at the state level must be final except for judicial review. This federal law takes precedent over conflicting state laws.

Rose alleges that the Nebraska procedure denied him his federally guaranteed rights by permitting the Commissioner of Education to become a part of the decisional process in his administrative appeal. Accepting the plaintiff's allegations as true, *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 109 (1979), the Court finds that this denial of Rose's federally protected rights is a sufficient injury in fact to satisfy the requirements of Article III. Furthermore, a favorable decision in this case will redress the injury Rose has suffered, since he will be able to obtain the impartial hearing to which he is entitled. Thus, this Court finds that Rose has standing under Article III to challenge NEB.REV.STAT. § 43-662.

Exhaustion of Administrative Remedies

The incident which precipitated Monahan's involvement in the instant action was the Omaha School Board's refusal to fund Daniel's education at George Norris. Shortly after the Board's decision, Monahan filed this suit under 20 U.S.C. § 1415, challenging the adequacy of the Nebraska administrative procedure for reviewing the placement of handicapped children. Prior to filing suit, however, Monahan never attempted to contest the Board's decision by utilizing the administrative hearing provided by the Nebraska statutes. The defendants contend that this failure to exhaust the administrative procedures available under Nebraska law prevents Monahan from challenging these procedures under 20 U.S.C. § 1415.

The Education of All Handicapped Children Act gives federal district courts jurisdiction to review placement decisions made in the state's due process hearings. 20 U.S.C. § 1415(e)(2). This grant of jurisdiction empowers the

Court not only to determine whether the placement decision was correct, but also to determine whether the state procedure denied the plaintiff of his procedural rights under the Act. *Loughran v. Flanders,* 470 F.Supp. 110, 113 (D. Conn. 1979). Generally, a party desiring to assert the jurisdiction provided by this Act must first exhaust the state's administrative procedures. Notwithstanding the general rule, a number of courts have held that exhaustion of state administrative procedures is not required when exhaustion would be futile. *Armstrong v. Kline,* 476 F.Supp. 583, 601-602 (E.D. Pa. 1979); *Harris v. Campbell,* 472 F.Supp. 51, 53-54 (E.D. Va. 1979); *Loughran v. Flanders, supra,* 470 F.Supp. at 112; *Campochiaro v. Califano,* No. H-78-64, slip op. at 4 (D. Conn. May 18, 1978); *New York State Association for Retarded Children, Inc. v. Carey, supra,* 466 F.Supp. at 486.

Given the nature of Monahan's claim, his pursuit of administrative relief would be a futile gesture. The gravamen of Monahan's complaint is that the Nebraska statutes create an administrative procedure which violates the mandates of the federal law. In essence, the plaintiff claims that he is faced with an ironclad procedure which the Nebraska statutes require to be followed in all hearings held to review the placement of a handicapped child. Such a claim cannot be resolved in the due process hearings themselves, since the persons conducting the hearings are without authority to ignore the procedures specifically mandated by state law. Thus, it would be a futile gesture for Monahan to attempt to resolve this dispute in an administrative hearing. The Court therefore finds that Monahan need not exhaust his state administrative remedies before bringing an action under 20 U.S.C. § 1415 to challenge the

propriety of the administrative procedure provided by Nebraska law.

Abstention

Upon the Court's request, the defendants have submitted a brief addressing the issue of abstention. There are at least three different doctrines under which a court may abstain from exercising jurisdiction conferred upon it by statute. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 814-17 (1976). Of these doctrines, only the *Pullman*-type abstention has been offered by the defendants as a basis for abstention in this case. *See Railroad Commission of Texas v. Pullman,* 312 U.S. 496 (1941). The Court will, therefore, limit its consideration of abstention in this opinion to a discussion of whether the *Pullman* doctrine requires abstention in this case.

Under the *Pullman* doctrine, abstention "is appropriate where the state laws are uncertain, and the uncertainty is such that a determination by the state court may obviate the need for deciding the federal constitutional question." *Herald Co. v. McNeal,* 553 F.2d 1125, 1129 (8th Cir. 1977). The purpose of this type of abstention is the avoidance of "the friction of a premature constitutional adjudication." *Railroad Commission of Texas v. Pullman, supra,* 312 U.S. at 500. Thus, the core of the *Pullman* doctrine is the requirement that a federal court should refrain from deciding federal constitutional issues until uncertain questions of state law have been resolved. *D'Ioric v. County of Delaware,* 592 F.2d 681, 685 (3d Cir. 1978).

The plaintiffs' complaint alleges that a conflict exists between Nebraska and federal law. Although such a claim

is based on the Supremacy Clause of the United States Constitution, it is not the type of constitutional claim to which the *Pullman* doctrine was designed to apply.

> It is true that technically a claim that a federal statute controls under the Supremacy Clause is a constitutional issue. . . . The claim that a federal statute controls is essentially an exercise in construing the federal statute. Once its meaning has been determined, application of the Supremacy Clause poses no novel constitutional problem. The policy against unnecessary decision of constitutional questions does not reach unnecessary construction of statutes. Thus while one of the other abstention doctrines might justify abstaining in a Supremacy Clause case, abstention should not be ordered on Pullman grounds.
>
> 14 C. Wright, FEDERAL PRACTICE AND PROCEDURE § 4252, at 455 (1978).

This analysis seems particularly appropriate in light of a recent Supreme Court case in which the Court held that in the context of 28 U.S.C. § 2281, Supremacy Clause claims are not to be equated with other constitutional claims. *Swift & Co. v. Wickham*, 382 U.S. 111, 126-29 (1965). This Court therefore finds that *Pullman*-type abstention has no application in this case.

Assuming that the *Pullman* doctrine should apply to constitutional claims under the Supremacy Clause, this Court is still of the opinion that this abstention doctrine has no application in this case. The *Pullman* doctrine only applies when the state law in question is susceptible to a reasonable interpretation that would avoid or alter the constitutional issue raised by the plaintiff's complaint. In the instant case, there is no reasonable interpretation of Nebraska law which would reconcile the federal and state procedures. The plain language of the state statute

indicates that the Commissioner of Education has at least some discretionary authority over the hearing officer's decision. *See* NEB.REV.STAT. § 43-662. Any grant of such discretionary authority to the Commissioner conflicts with the federally mandated procedures.[3] Since this conflict cannot be avoided by any reasonable interpretation of the state law, this Court finds that *Pullman*-type abstention should not apply in this case, even assuming the doctrine applies to Supremacy Clause cases. *See generally Zbaraz v. Quern,* 572 F.2d 582, 586 (7th Cir. 1978); *Valley Family Planning v. State of North Dakota,* 475 F.Supp. 100, 102 (D. N.D. 1979).

IV.

Part of the preliminary relief sought by the plaintiffs is an order requiring the defendants to provide Marla and Daniel with an educational placement pending resolution of this suit. The provisional placement of these children during this litigation is governed by the Education of All Handicapped Children Act:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child *shall* remain in the *then current educational placement* of such child . . . until all such proceedings have been completed. (emphasis supplied).
>
> 20 U.S.C. § 1415(e)(3).

This provision is designed to preserve the status quo pending resolution of judicial or administrative proceedings

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[3] This Court's analysis of the proper interpretation of NEB. REV. STAT. § 43-662 is found in Part V of this Memorandum Opinion.

held under the Act. 45 C.F.R. § 121a 513 (1979). *See New York State Ass'n for Retarded Children, supra,* 466 F. Supp. at 486. In essence, it is like an automatic preliminary injunction which maintains the child's then current educational placement. However, unlike a preliminary injunction, the statute replaces "the Court's discretionary consideration of irreparable harm and likelihood of success on the merits with an absolute rule in favor of the status quo." *Gargani v. The School Committee of Cranstan,* No. 77-0612, slip op. at 6 (D. R.I. May 4, 1978). The Court is therefore without the power to place a child in any provisional placement except for his then current educational placement. *Campochiaro v. Califano,* No. H-78-64, slip op. at 10 (D. Conn. May 18, 1978). Thus, to the extent that plaintiffs seek an interim placement other than Marla's and Daniel's then current educational placement, the request must be denied.

Although the Act simplifies the determination of where to place a child during litigation, two issues remain to be resolved in the instant case. First, the Court must ascertain what is Marla's and Daniel's "then current educational placement." Unfortunately, this determination is somewhat unguided since this term is not defined in the Act. Having determined the child's then current placement, the Court must next decide who is to pay the costs of this placement during the proceedings. The resolution of these issues depends on facts unique to each plaintiff. The Court will therefore discuss each plaintiff's claim separately.

Plaintiff Monahan

The factual setting of the Monahan claim is unique. During the 1978-1979 school year, Daniel was attending

the Madonna School, a private school for the mentally retarded. This placement was apparently acceptable to both the school district and Daniel's parents. The cost of tuition at Madonna was paid by the Omaha School District.

By June of 1979, Daniel's physical condition had deteriorated to the point that he had become confined to a wheelchair. Since Madonna was not equipped to educate wheelchair bound students, Daniel was forced to leave the school at the end of the 1978-1979 school year. It should be emphasized that this change of placement was necessitated by factors beyond the control of either the Omaha School District or the Monahans. In any event, it would appear that, at this point, Daniel was without an educational placement since he could not return to Madonna, his former educational placement.

Upon learning of Daniel's termination at Madonna, Monahan obtained a new educational evaluation of Daniel from the Millard School District. This evaluation recommended George Norris Elementary School as an appropriate educational placement for Daniel. Monahan then took this recommendation to Dr. Samuelson and requested that the Omaha School District pay for Daniel's education at Millard. Until this request was made in July of 1979, it does not appear that the Omaha School District had been informed that Daniel could not return to the Madonna School. In any event, the school district refused to pay for the Millard placement.

This factual setting presents a difficult question of the proper interpretation of the term "then current educational placement." Normally, the then current placement is determined at the time a complaint is submitted

to the local school district, since such a complaint would be the beginning of an administrative proceeding provided by the Act. *Stuart v. Nappi*, 443 F.Supp. 1235, 1241 (D. Conn. 1978). *See* 20 U.S.C. § 1415(b)(1)(E). However, the factual setting of the Monahan claim does not fit this normal situation. When Monahan in July of 1979 requested the Omaha School District to pay for the Millard placement, Daniel had no educational placement. At that time, Daniel could not return to his former placement at Madonna because of his physical condition. In addition, the proposed placement at George Norris was merely a recommendation which had never been implemented.

The Court, however, need not resolve the issue of what is Daniel's then current educational placement because neither party objects to Daniel's continued placement at George Norris. Monahan has requested that this Court permit Daniel to remain in the Millard school and has argued that 20 U.S.C. § 1415(e)(3) requires such a placement. For their part, the defendants have raised no objections to the George Norris placement pending resolution of this suit. Since the parties do not object to Daniel's placement at George Norris during the pendency of this suit, the Court will treat this placement as Daniel's then current educational placement under 20 U.S.C. § 1415 (e)(3).

The designation of George Norris as Daniel's then current educational placement does not resolve the issue of who should pay for this placement during the instant litigation. For the reasons discussed below, this Court is of the opinion that Monahan should continue to pay the costs of this placement.

The Act prohibits any change in a child's then current educational placement once a proceeding under the Act has been initiated. The purpose of this requirement is to insure that the status quo is maintained during pendency of a proceeding. Thus, neither party is permitted to make a unilateral change in the education of the child. Moreover, the maintenance of the status quo requires that the school district *continue* to finance an educational placement which it had financed prior to the commencement of the proceeding. The operation of this requirement is illustrated by the following hypothetical situation.

Assume that prior to any proceedings under the Act, a child is being educated in educational placement "A" at school district expense. The school district then gives the parents notice of a proposed change in placement, and the parents file a complaint under the Act. In such a situation, the Act requires that this child remain in placement "A" and that the school district continue to pay for a child's education in placement "A" as it had done previously. Any refusal by the school district to continue payment would amount to a change in placement prohibited by the Act. *See Gargani v. The School Committee of the City of Cranston*, No. 77-0612, slip op. at 7 (D. R.I. May 4, 1978). Thus, the maintenance of the status quo under the Act requires not only that a child be educated in the same placement during any proceeding under the Act, but also that no change in the financing of that placement occur.

Unlike the hypothetical situation, the maintenance of the status quo in the Monahan case does not require that the defendants pay for Daniel's education pending resolution of this litigation. The status quo in the instant case

is Daniel's placement at George Norris paid for by Daniel's father. In contrast to the hypothetical situation, the Omaha School District had at no time paid the costs of the George Norris placement. Thus, this case does not present a situation where the school district has refused to continue to provide financial assistance which it had given prior to the filing of the complaint. To maintain the status quo in the instant case, Daniel should remain in his then current placement at George Norris and his father should continue to pay the costs of the placement as he has done in the past. Requiring the Omaha School District to finance the George Norris placement would be a change in the status quo, since such payments had never been provided in the past.

Plaintiff Rose

The factual setting of the Rose claim is similar to the hypothetical situation set out above. Prior to the 1978-79 school year, Marla was attending Beveridge Junior High School. In June of 1978, Marla's parents received notice of a proposed change of placement. The Roses were not satisfied with this proposed change and filed a complaint with the local school authorities in the summer of 1978. Although various administrative and judicial proceedings followed the filing of this complaint, the facts presented here are sufficient to determine Marla's then current educational placement under 20 U.S.C. § 1415(e)(3).

Under § 1415(e)(3), Marla is entitled to remain in her then current educational placement throughout any of the proceedings which are held pursuant to the Act. The then current educational placement is determined at the time that a complaint is filed under the Act. *Stuart v. Nappi, supra*, 443 F.Supp. at 1241. In the instant case,

Marla's educational placement at the time her father filed a complaint with the Omaha School District was at the Beveridge Junior High School, where she attended both regular and special education classes. The cost of this placement was borne by the Omaha School District. Thus, this placement is her then current educational placement under § 1415(e)(3) and she is entitled to remain in this placement throughout all the proceedings held under the Act. In addition, the cost of this placement shall be borne by the Omaha School District.

This holding which requires Marla to be readmitted to the Omaha public schools does not mean that Marla must be placed in Beveridge Junior High. If other schools can provide the same type of education that she received at Beveridge, then placement in those schools would satisfy 20 U.S.C. § 1415(e)(3). *See* Stipulation of the Parties in CV 79-0-300 [Exhibit § 6].

V.

Aside from requesting that this Court provide for the interim placement of Marla and Daniel, the plaintiffs seek a preliminary injunction appointing an impartial hearing officer to determine an appropriate placement for these children. Unlike the request for an interim placement, the resolution of this issue is governed by the standard for the granting of preliminary injunctions.

The purpose of a preliminary injunction is to maintain the status quo pending resolution of the litigation. *Jordan v. Wolke,* 593 F.2d 772, 773 (7th Cir. 1978). Generally, a preliminary injunction will fulfill this function by prohibiting the defendant from taking harmful action while a suit is being litigated. However, when the plain-

tiff will suffer irreparable harm because of the defendant's inaction, a court may grant a mandatory preliminary injunction requiring the defendant to take certain affirmative action pending resolution of the litigation. *See 7 Moore's Federal Practice* ¶ 65.04[1] (1979). Traditionally, courts have disfavored mandatory preliminary injunctions and have granted them in only rare situations. *See Harris v. Willters,* 596 F.2d 678, 680 (5th Cir. 1979); *Jordan v. Wolke, supra,* 593 F.2d at 773-74; *Jacobson & Co. v. Armstrong Cork Company,* 548 F.2d 438, 441, 441 n.3 (2d Cir. 1977). Such injunctions are only granted when the moving party has made a clear showing that the facts and law entitle him to preliminary relief. *Flintkote Co. v. Blumenthal,* 469 F.Supp. 115, 125-26 (N.E. N.Y. 1979), *aff'd* 596 F.2d 51 (2d Cir. 1979). *Bricklayers, Masons, Marble and Tile Setters, Protective and Benevolent Union v. Lueder Construction Company,* 346 F.Supp. 558, 561 (D. Neb. 1972).

The standard for determining whether a party is entitled to preliminary relief is well settled in this Circuit. A party is not entitled to a preliminary injunction unless he makes a showing of either "(1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Fennell v. Butler,* 570 F.2d 263, 264 (8th Cir. 1978), *cert. denied* 437 U.S. 906 (1978). Applying this standard to the instant case, the Court must determine whether the plaintiffs have made a sufficient showing to justify the granting of a mandatory preliminary injunction.

Merits of the Plaintiffs' Claim

Before issuing a preliminary injunction, the Court must consider the plaintiffs' chances of success on the merits. In the instant case, this inquiry will focus on the merits of the plaintiffs' claim that the Nebraska statutory procedure for administrative appeals of local school districts educational placement decisions conflicts with federal law. For the reasons discussed below, this Court finds that the plaintiffs have clearly raised "sufficiently serious questions going to the merits to make them a fair ground for litigation," and therefore that they have made a sufficient showing on the merits to justify a preliminary injunction. *Fennell v. Butler, supra,* 570 F.2d at 264.

The Education of All Handicapped Children Act provides specific procedural safeguards which must be adopted by states receiving funds under the Act. These safeguards govern educational proceedings in Nebraska, since it is a recipient of funds under the Act. Thus, any Nebraska law which is inconsistent with these federally mandated procedures is superseded by the federal law. *See Robert M. v. Benton,* No. 79-4007 (N.D. Ia. August 13, 1979); *Compochiaro v. Califano,* No. H-78-64 (D. Conn. May 18, 1978).

Under the Act, any parent who complains about the educational placement of a handicapped child shall be given an opportunity for an impartial due process hearing. 20 U.S.C. § 1415(b)(2). These due process hearings may be held at either the state or local level, whichever is designated by state law. 20 U.S.C. § 1415(b)(2). Under Nebraska law, the due process hearings are held at the state level. NEB.REV.STAT. § 43-662. When the due

process hearings are held at the state level, the Act provides that any decision made in that hearing shall be final, subject only to judicial review. 20 U.S.C. § 1415(e)(1).

Comparing the federal procedural scheme to that of Nebraska, the Court finds an important inconsistency between the state and federal procedures. The Nebraska law provides that the due process hearings shall be conducted by the State Department of Education using impartial hearing officers. NEB.REV.STAT. §§ 43-662, 43-663. However, in contrast to the federal guidelines, a final decision is not made in the due process hearing. Rather, the hearing officer merely prepares a report which is then delivered to the Commissioner of Education. This report contains the hearing officer's "findings of facts based on the evidence presented and decisions based on such findings." NEB.REV.STAT. § 43-662. Once the Commissioner receives the report, the Nebraska statute provides:

> After reviewing such findings and decisions the Commissioner of Education shall then recommend or direct such action as may be necessary.
>
> NEB.REV.STAT. § 43-662.

Based on this statutory language, it appears that the Commissioner of Education has the discretionary authority to accept, reject or modify the decision made in the due process hearing. Such discretion conflicts with the federal requirement that the decision made in the due process hearing shall be final except for judicial review. 20 U.S.C. § 1415(e)(1). *See Matter of "A" Family*, — Mont. —, —, 602 P.2d 157, 166-67 (1979).

The defendants, however, contend that this interpretation of the Commissioner's authority is erroneous be-

cause it conflicts with the legislative history of the statute. To support this contention, the defendants have offered into evidence the legislative history of L.B. 871 which was later codified in part at NEB.REV.STAT. § 43-661 *et seq.* This history contains only one very brief discussion of the procedural framework created by L.B. 871:

> The third amendment applies to the hearing and the appeals board which we adopted two years ago to bring us into compliance with the 94-142. We must provide for hearing officers under the Department of Education. The appeals board stays intact but we are providing for hearing officers as 94-142 says we must do.
>
> *Nebraska Legislative Floor Debate on* L.B. 871, 85th Legis. 2d Sess. 09246 (1978) (statement of Senator Koch).

This passage indicates that the Unicameral's purpose in enacting L.B. 871 was to comply with the provisions of the Education of All Handicapped Children Act and thereby to make Nebraska eligible for funding under the Act. *See Nebraska Legislative Floor Debate on L.B. 871,* 85th Legis., 2d Sess. 08706 (1978) (statement of Senator Koch). Based on this expression of legislative intent, the defendants argue that this Court must interpret the scope of the Commissioner's authority under NEB.REV.STAT. § 43-662 in a manner which makes the state statute consistent with federal law. Thus, they conclude that NEB.REV. STAT. § 43-662 should be interpreted to require that the Commissioner enforce the hearing officer's decision without alteration.

This Court refuses to adopt the defendants' suggested analysis based on the statute's legislative history. Be-

yond indicating the Unicameral's general intent, the legislative history of this statute provides little or no aid in determining the scope of the Commissioner's authority. The history contains no indication of the legislature's understanding of how broad the Commissioner's authority under § 43-662 would be. In light of the weaknesses in the legislative history, this Court refuses to strain its interpretation of the plain language of NEB.REV.STAT. § 43-662 in an effort to conform with this nebulous statement of legislative intent. The Court is of the opinion that the intended scope of the Commissioner's authority is best determined by examining the language of the statute itself.

When interpreting a statute, the Court examines the language of the statute to determine the legislature's intent. In making this inquiry, the Court should attempt to find a *reasonable* interpretation which supports the validity of the statute. *See Johnson v. Exon,* 199 Neb. 154, 157, 256 N.W.2d 869, 871 (1977). Such an interpretation should be based on the plain and ordinary meaning of the statute's language. Moreover, "no sentence, clause or word should be rejected as meaningless or superfluous." *Weiss v. Union Insur. Company,* 202 Neb. 469, 473, 276 N.W.2d 88, 92 (1979). Applying these rules of construction to the instant case, this Court finds that limiting the Commissioner's authority as suggested by the defendants would not be a reasonable interpretation of the plain language of NEB.REV.STAT. § 43-662.

The plain language of § 43-662 clearly indicates that the Commissioner was intended to do more than merely rubber stamp the hearing officer's decision. In pertinent part, the statute provides:

> After *reviewing* [the hearing officer's] findings and decisions, the Commissioner of Education shall then recommend or direct such action as may be *necessary*. (emphasis supplied)
>
> NEB.REV.STAT. § 43-662.

This language clearly gives the Commissioner the authority to *review* the hearing officer's decision and to direct such action as may be *necessary*.

Despite this language, the defendants contend that NEB.REV.STAT. § 43-662 requires the Commissioner to implement the hearing officer's decision without alteration. The adoption of this interpretation, however, would make superfluous the statutory language granting the Commissioner authority to review the hearing officer's decision since he would be obligated to implement the decision unchanged, regardless of the result of the review. Similarly, the defendants' interpretation makes the term "necessary" meaningless, since the Commissioner would have to implement the hearing officer's decision whether it was necessary or not. Thus, this Court rejects the defendants' interpretation which deprives the Commissioner of all discretion to modify a hearing officer's decision.

The only interpretation which gives meaning to all the language of NEB.REV.STAT. § 43-662 is one which gives the Commissioner some discretionary authority over the hearing officer's decision. The statute plainly states that the Commissioner is to review the hearing officer's decision and is to direct any necessary action. At a minimum, this language should be read as giving the Commissioner authority to review the hearing officer's decision, and then to determine what action is necessary.

This interpretation of the Nebraska statute is further supported by Nebraska Department of Education

Rule 55. This rule governs special education appeals and provides:

> After the completion of a hearing, the hearing officer shall prepare a report setting forth the petition, the answer, the substance of the evidence presented at the hearing, his findings of fact, and his decision and *recommendation for action.*
>
> Rule 55(8)(a) of the Nebraska Department of Education.

This rule clearly indicates that the hearing officer does not have the authority to make a final decision on the issue of what action should be taken in a particular case. Rather, he is limited to making a "recommendation for action."[4] This recommendation is then conveyed to the Commissioner, who then directs such action as may be "necessary and proper." Rule 55-(8)(b). These rules read in combination show that the Commissioner, not the hearing officer, makes the final decision on what action should be taken following a due process hearing. *Compare Matter of "A" Family, supra,* — Mont. at —, 602 P.2d at 166-67 (where an overbroad statute was corrected by education department rules which made clear that the hearing officer's decision was final).

Any interpretation of NEB.REV.STAT. § 43-662 which gives the Commissioner authority to modify the hearing officer's decision creates a conflict between the Nebraska statute and the federal requirement that the hearing officer's decision shall be final. This, however, is the only reasonable interpretation of the statute's plain

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[4] The language used by the hearing officer in his report in the Rose case also indicates that his decision is a recommendation. [Exhibit #5, pp. 46-47, 53-54].

language and of the rules of the Department of Education. This Court, therefore, finds that the plaintiffs have raised sufficiently serious questions as to the validity of the Nebraska procedure to make them fair grounds for litigation.

Hardship on the Plaintiffs

Notwithstanding the meritorious nature of the plaintiffs' claims, the Court cannot issue a preliminary injunction without considering the hardships which would befall the plaintiffs if preliminary relief was not granted. Under either preliminary injunction standard provided in *Fennell,* a preliminary injunction is not appropriate unless the plaintiffs show that they would suffer irreparable harm if relief was denied. *See Frejlach v. Butler,* 573 F.2d 1026, 1027 n.4 (8th Cir. 1978). Since the plaintiffs are not identically situated with respect to the hardships they would suffer, the Court will discuss the hardships of each separately.

If preliminary relief is not granted in the Monahan case, Daniel will remain in the George Norris placement and his father will continue to pay the costs of this placement pending resolution of this litigation. The parties apparently agree that Daniel's educational development will not be harmed if he remains at George Norris, since that placement provides him with an appropriate education. Although Daniel's education will not be harmed if preliminary relief is not granted, Daniel's father will be harmed monetarily, since he will continue to pay the cost of this placement.

Monetary damage which is recoverable upon completion of the litigation is not generally considered to be

irreparable harm which justifies the granting of preliminary relief. *Ralls v. Wolfe,* 321 F.Supp. 867, 868 (D. Neb. 1971), *aff'd* 448 F.2d 778 (1971). This is especially true when the plaintiff is seeking a mandatory preliminary injunction. *Jacobson & Co., Inc. v. Armstrong Cork, supra,* 548 F.2d at 441 n.3. This Court must therefore determine whether Monahan can recover the cost of the George Norris placement if he prevails on his claim under the Education of All Handicapped Children Act.

The Education of All Handicapped Children Act specifically creates a private cause of action which may be brought in federal court. In resolving such lawsuits, the Court is empowered by the Act to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). This language indicates that the Court has broad authority in granting relief under the Act. This conclusion is reinforced by the Act's legislative history, which states that "the court . . . shall grant *all* appropriate relief." *Joint Explanatory Statement of the Committee of Conference,* S.Rep.No. 94-455, 94th Cong., 1st Sess., at 50, *reprinted in* U.S. Code Cong. and Admin. News, at 1503 (1975). This language in the Act and its legislative history strongly suggest that the Court may award damages under the Act when such relief is deemed to be appropriate. *Boxall v. Sequoia Union High School District,* 464 F.Supp. 1104, 1112 (N.D. Ca. 1979). Moreover, recovery of the cost of tuition in the instant case would further the Act's purpose. This expenditure for tuition was allegedly made because of the defendant's failure to comply with the Act's procedural requirements. If these claims are proved, recovery of this cost will further the Act's purpose of ensuring that all handicapped children

receive a free appropriate education. In other words, the defendants would be required to pay the costs of Daniel's education and thus provide Daniel with a free education as the Act requires. *Compare Loughran v. Flanders, supra,* 470 F.Supp. at 115 (which held that a plaintiff could not recover damages for emotional injury or future lost earnings because such recovery would hinder fulfillment of the Act's purpose). Thus, this Court finds that if Monahan proves his claim under the Act, an award of damages may be appropriate to compensate him for the cost of the George Norris placement.

Given the existence of a damages remedy under 20 U.S.C. § 1415(e)(2), this Court is of the opinion that Monahan has not made a sufficient showing of irreparable harm to justify granting a preliminary injunction. This holding is based on the fact that the evidence fails to show that an award of damages to Monahan would not be appropriate under 20 U.S.C. § 1415(e)(2), assuming Monahan proves the merits of his claim. Thus, there has been no showing that Monahan will suffer an irreparable harm for which no adequate remedy at law is available. *Frejlach v. Butler, supra,* 573 F.2d at 1027. In addition, the Court finds that the existence of this monetary relief indicates that the balance of hardships do not tip decidedly in Monahan's favor. In light of these findings, Monahan's request for preliminary relief must be denied.

Unlike Daniel Monahan, Marla Rose will suffer irreparable harm if a preliminary injunction is not granted. This harm will be the result of Marla's educational placement during this litigation. Pending resolution of this lawsuit, Marla must remain in her then current educational placement in the Omaha School District. However, ac-

cording to Dr. Samuelson's testimony, this placement will not enable Marla to make any educational progress. Thus, each day spent in this placement is a day which cannot be utilized to further her educational development. This type of loss cannot be compensated for by money damages, and therefore amounts to irreparable harm. *Ralls v. Wolfe, supra,* 321 F.Supp. at 868. Granting preliminary relief here will cut to a minimum the days of educational progress which Marla will lose. This Court, therefore, concludes that under either preliminary injunction test, Rose has made a sufficient showing of irreparable harm to warrant this Court issuing a mandatory preliminary injunction. *See Compochiaro v. Califano,* No. H-78-64, slip op. at 9 (D. R.I. May 18, 1978).

Conclusion

Both plaintiffs seek a preliminary injunction appointing an impartial hearing officer to determine an appropriate educational placement for their children. Applying the standards found in *Fennell,* this Court is of the opinion that the plaintiffs have raised sufficient questions concerning the propriety of the Nebraska procedure to satisfy either *Fennell* test. Notwithstanding this showing, Monahan is not entitled to preliminary relief because of his insufficient showing of irreparable harm. Rose, however, has satisfied the irreparable harm element of the *Fennell* tests and thus shall be granted preliminary relief.

Although Rose is entitled to a preliminary injunction, the issue remains of what form of relief is appropriate here. In his complaint, Rose has requested that this Court appoint a hearing officer to conduct the hearing

in his daughter's case. The Court is of the opinion that it would be inappropriate for this Court to make such an appointment. Rather, the Court shall order the Commissioner of Education to appoint an impartial hearing officer to hear Rose's case. The Commissioner, however, will be ordered to abstain from any review of the hearing officer's decision, and shall be required to implement such decision without modification.

An order will be filed contemporaneously with this Memorandum Opinion.

Dated this 16th day of May, 1980.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL NO. 80-0-164

James J. Monahan, as next friend of Daniel J. Monahan, and George Rose, as next friend of Marla Rose,

Plaintiffs,

vs.

State of Nebraska; Charles Thone, Governor of the State of Nebraska; Board of Education, School District #1, Douglas County, Nebraska; Owen Knutzen, Individually, and as Superintendent of the School District #1, Douglas County, Nebraska; Dale Samuelson, Individually, and as Assistant Superintendent in Charge of Special Education of School District #1, Douglas County, Nebraska; Anne Campbell, Commissioner of Education for the State of Nebraska; State Board of Education, Walter M. Thompson, Individually, and as a Member of the State Board of Education; Margaret Lockwood, Individually, and as a Member of the State Board of Education; Frank E. Landis, Individually, and as a Member of the State Board of Education; Don M. Lienemann, Individually, and as a Member of the State Board of Education; Dorothy Creigh, Individually, and as a Member of the State Board of Education; Arlene E. Hart, Individually, and as a Member of the State Board of Education; William C. Ramsey, Individually, and as a Member of the State Board of Education; Dorothy Beaver, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; June Bostwick, Individually and as a Member of the Board of Education School District #1, Douglas County, Nebraska; Walter Calinger, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; Pat Geringer, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; Leo Hoff-

man, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; Gaynelle Goodrich, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; Ruth Thomas, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; Frank Bogard, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; Ron McGruder, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; James A Monaghan, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; James Beutel, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska; and Leo Kastrick, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska,

Defendants.

ORDER

(Filed May 16, 1980)

In accordance with the Memorandum Opinion filed contemporaneously herewith,

IT IS HEREBY ORDERED that Daniel Monahan shall continue to attend the George Norris Elementary School and that the costs of such placement shall be borne by James H. Monahan. Unless the parties agree otherwise, this placement shall continue during the pendency of all proceedings held under the Education of All Handicapped Children Act.

IT IS FURTHER ORDERED that Marla Rose be returned to her "then current educational placement" in the Omaha Public Schools. The cost of this placement shall be borne by the Omaha School District. Unless the parties agree otherwise, this placement shall continue

during the pendency of all proceedings held under the Act.

IT IS FURTHER ORDERED that the Commissioner of Education shall appoint an impartial hearing officer who shall hold a due process hearing on Rose's complaint. The Commissioner shall abstain from engaging in any review of the hearing officer's decision and shall implement such decision without modification.

IT IS FURTHER ORDERED that in all other respects, the plaintiffs' request for a preliminary injunction shall be denied.

Dated this 16th day of May, 1980.

BY THE COURT

/s/ Robert V. Denney
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1436

James H. Monahan, as next friend of Daniel J. Monahan; George Rose, as next friend of Marla Rose,

Appellees,

vs.

State of Nebraska, Charles Thone, Governor of The State of Nebraska, Board of Education, School District #1, Douglas County, Nebraska, Owen Knutzen, Individually, and as Superintendent of School District #1, Douglas County, Nebraska, Dale Samuelsen, Individually, and as Assistant Superintendent in Charge of Special Education, of School District #1, Douglas County, Nebraska, Anne Campbell, Commissioner of Education for the State of Nebraska, State Board of Education, Walter M. Thompson, Individually, and as a Member of the State Board of Education, Margaret Lockwood, Individually, and as a Member of the State Board of Education, Frank E. Landis, Individually, and as a Member of the State Board of Education, Don M. Lienemann, Individually, and as a Member of the State Board of Education, Dorothy Creigh, Individually, and as a Member of the State Board of Education, Arlene E. Hart, Individually, and as a Member of the State Board of Education, William C. Ramsey, Individually, and as a Member of the State Board of Education, Dorothy Beaver, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, June Bostwick, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Walter Calinger, Individually, and as a Member of the Board of Education, School Dis-

trict #1, Douglas County, Nebraska, Pat Geringer, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Leo Hoffman, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Gaynelle Goodrich, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Ruth Thomas, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Frank Bogard, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Ron McGruder, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, James A. Monaghan, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, James Beutel, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, and Leo Kastrick, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska,

Appellants.

Appeals from the United States District Court
for the District of Nebraska

No. 80-1469

James H. Monahan, as next friend of Daniel J. Monahan,

Appellant,

George Rose, as next friend of Marla Rose,

vs.

State of Nebraska, Charles Thone, Governor of The State of Nebraska, Board of Education, School District #1, Douglas County, Nebraska, Owen Knutzen, Individually, and as Superintendent of School District #1, Douglas

County, Nebraska, Dale Samuelsen, Individually, and as Assistant Superintendent in Charge of Special Education, of School District #1, Douglas County, Nebraska, Anne Campbell, Commissioner of Education for the State of Nebraska, State Board of Education, Walter M. Thompson, Individually, and as a Member of the State Board of Education, Margaret Lockwood, Individually, and as a Member of the State Board of Education, Frank E. Landis, Individually, and as a Member of the State Board of Education, Don M. Lienemann, Individually, and as a Member of the State Board of Education, Dorothy Creigh, Individually, and as a Member of the State Board of Education, Arlene E. Hart, Individually, and as a Member of the State Board of Education, William C. Ramsey, Individually, and as a Member of the State Board of Education, Dorothy Beaver, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, June Bostwick, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Walter Calinger, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Pat Geringer, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Leo Hoffman, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Gaynelle Goodrich, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Ruth Thomas, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Frank Bogard, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Ron McGruder, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, James A. Monaghan, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, James Beutel, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, and Leo Kastrick, Individually, and as a Member of the

Board of Education, School District #1, Douglas County, Nebraska,

Appellees.

Submitted: October 13, 1980

Filed: April 1, 1981

Before STEPHENSON and HENLEY, Circuit Judges, and HUNTER,* District Judge.

HENLEY, Circuit Judge.

The State of Nebraska, the Omaha School District, and others (collectively defendants) appeal from an order of the district court[1] granting a preliminary injunction in favor of plaintiff Marla Rose. Plaintiff Daniel Monahan also cross-appeals from the court's denial of his request for a preliminary injunction.

The primary issue[2] raised by plaintiffs in the district court was whether Neb. Rev. Stat. § 43-662 (1978) (the State Act) is consistent with provisions of the Education

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*The Honorable Elmo B. Hunter, sitting by designation on this panel, is now Chief Judge of the United States District Court for the Western District of Missouri.

[1]The Honorable Robert V. Denney, United States District Judge for the District of Nebraska.

Judge Denney's well-reasoned opinion is reported at 491 F.Supp. 1074 (1980).

[2]Plaintiffs refer to certain other claims, *e.g., bias of the hearing officer in the Rose case, potential bias of the Commissioner of Education in the Monahan case,* and etc., which they say were presented to the district court. To the extent that such issues have been preserved for appeal, *we find them without merit* on the record before us.

for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1420 (the Federal Act).

20 U.S.C. § 1415 outlines procedural safeguards which state and local agencies receiving federal funds must observe to ensure that a handicapped child's right to a free appropriate public education is protected. In order to conform with these procedural requirements, Nebraska amended its law regarding hearings on the placement of handicapped students. Neb.Rev.Stat. §§ 43-661—43-668.

The plaintiffs contend that Nebraska's provision for review of the hearing officer's decision by the State Commissioner of Education[3] is in conflict with the Federal Act's requirement that the decision made in the hearing "shall be final."[4] Plaintiffs argue that the Commission-

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[3]Neb.Rev.Stat. § 43-662 (as amended 1978) provides:

> The State Department of Education shall conduct hearings . . . using hearing officers who shall prepare a report containing findings of facts based on the evidence presented and decisions based on such findings. *After reviewing such findings and decisions the Commissioner of Education shall then recommend or direct such action as may be necessary.*

(Emphasis added.)

[4]20 U.S.C. § 1415 provides in revelant part:

> (b)(2) Whenever a complaint has been received . . . the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.
>
> . . .

(Continued on next page)

er's review power amounts to unlimited discretion to reject the decision of the hearing officer and that such discretion has deprived or would deprive them of the right to a due process hearing.

Marla Rose.

Marla Rose is deaf and has a related speech impairment. Prior to the 1978-79 school year, she attended classes at Beveridge Junior High School in the Omaha School District (Omaha). In June, 1978 the School District notified Marla's parents that it proposed to change Maria's placement from Beveridge to the Nebraska School for the Deaf.

On August 14, 1978 George Rose filed a petition with the Nebraska Department of Education seeking a due process hearing regarding the proposed change in his daughter's placement. See Neb.Rev.Stat. §§ 43-661—43-668. The case was assigned to an independent hearing officer, and a lengthy administrative hearing was held in March, 1979.

The hearing officer made his written report to the Nebraska Commissioner of Education on May 16, 1979. The report contained a summary of the evidence, findings of fact, and the officer's decision. The officer found that Marla needed the training offered by the School for the

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(Continued from previous page)

> (e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section *shall be final* . . . [except for a right of appeal to the state agency if the hearing was held at the local level and a right to sue in district court in every case].

(Emphasis added.)

Deaf, and he concluded that Omaha's recommendation that she be placed there was appropriate. The officer recommended that the appeal by Marla's parents be dismissed.

On June 1, 1979 the Commissioner of Education entered an order acknowledging receipt of the hearing officer's report and the hearing exhibits, adopting the report verbatim as the basis for the order, and dismissing the Rose appeal.[5]

Mr. Rose filed an action challenging the Commissioner's order.[6] Pending resolution of the lawsuit, the parties agreed that Marla would attend the Monroe Junior High School in the Omaha School District. In September, 1979, however, after only two weeks of school, Marla was withdrawn from Monroe by her parents. They placed her in an unaccredited private school which had no special programs for the deaf.

Daniel Monahan.

Daniel Monahan has multiple handicaps: muscular dystrophy, mental retardation, and a seizure disorder. Through the 1978-79 school year Daniel attended the Madonna School, a private elementary school for mentally

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[5]The Commissioner's order stated in relevant part:

> Upon having reviewed and examined the Report, the Exhibits and the Briefs, the Commissioner of Education hereby adopts verbatim as the basis for this Final Decision and Order, the Report of the Hearing Officer.

[6]In November, 1979 Rose's first suit (CV 79-0-300) was dismissed for failure to join an indispensable party. A second suit (CV 80-0-67), filed in February, 1980, was dismissed in October, 1980 as duplicative of the present action. The instant suit was filed in March, 1980.

retarded children. Under contract with Madonna, the Omaha School District paid for Daniel's education.

Before the start of the 1979-80 school year Daniel became confined to a wheelchair. Madonna was not equipped to accommodate wheelchair students so Daniel's father sought an alternative school. He obtained permission from the Millard School District to enroll Daniel there. Omaha school officials, however, believed that a comparable program was offered at their Hartman School and they therefore refused to fund Daniel's school at Millard. Nevertheless, Mr. Monahan enrolled his son at Millard at his own expense.

Mr. Monahan was aware of his right to obtain a due process hearing before an independent hearing officer to review Omaha's decision. He did not seek such a hearing, however. *In January, 1980 he filed this suit in district court.*

The district court granted certain preliminary relief for plaintiff Rose but denied preliminary relief for Monahan. The court's order required that during the pendency of the case Marla Rose should be returned to her placement in an Omaha junior high school and that Daniel Monahan should remain in the Millard School District at his father's expense. The court also ordered the Nebraska Commissioner of Education to appoint an impartial hearing officer to hold a second due process hearing on Marla Rose's educational placement, enjoined the Commissioner from engaging in any review of the hearing officer's decision, and ordered the Commissioner to implement

such decision without modification.[7] We affirm in part and remand for further proceedings consistent with this opinion.

We address several preliminary issues before turning to the merits of this appeal.

First, we agree with the reasoning of the district court that plaintiff Rose has standing under article III of the United States Constitution to challenge Neb. Rev. Stat. § 43-662. Rose argues that her federally guaranteed procedural rights were violated by the Commissioner's review of the hearing decision. Accepting this contention as true, *Warth v. Seldin,* 422 U.S. 490, 501 (1975), we find that Rose has alleged a sufficiently "personal stake in the outcome of the controversy," *id.* at 498, to invoke the jurisdiction of the federal courts.[8]

We also concur with the district court's conclusion that, in the circumstances, Daniel Monahan was not required to exhaust his administrative remedies under the Nebraska Act. Although the federal framework mandates initial resort to the state administrative process, 20 U.S.C. § 1415(e)(2), exhaustion is not required where it would be futile or where the administrative remedy would be inadequate. *Matthews v. Eldridge,* 424 U.S. 319, 329-30 (1976); *Armstrong v. Kline,* 476 F.Supp. 583, 601-02

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[7]This court entered an order July 8, 1980 staying that portion of the preliminary injunction requiring the Commissioner to appoint a hearing officer to conduct a second due process hearing and prohibiting the Commissioner from reviewing or modifying the hearing officer's decision.

[8]A similar analysis supports Daniel Monahan's standing to sue. See also the discussion of exhaustion of administrative remedies which follows.

(E.D. Pa. 1979), *remanded on other grounds,* 629 F.2d 269 (3d Cir. 1980); *Loughran v. Flanders,* 470 F.Supp. 110, 112-13 (D. Conn. 1979). In the present case, Monahan's claim that the state procedure on its *fact* conflicts with the Federal Act could not be addressed effectively by the state administrative process.

As a final preliminary matter, we approve the district court's decision on interim educational placement for the children. The Federal Act provides that during the pendency of any proceeding the child shall remain in his "then current educational placement," absent consent of all parties. 20 U.S.C. § 1415(e)(3). At the time this suit was initiated, Daniel Monahan's physical condition prevented his return to the Madonna School. Although Omaha offered to place Daniel in its Hartman School, the Monahans unilaterally decided to send Daniel to the Millard School. In these circumstances, the district court concluded that the status quo would best be maintained by permitting Daniel to remain at the Millard School at his parents' expense. This result is fully consistent with the terms and policy of the Federal Act. *See Stemple v. Board of Education,* 623 F.2d 893, 897-98 (4th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3606 (Feb. 24, 1981). It is not disputed that Marla Rose's "then current educational placement" was an appropriate Omaha junior high school. Her parents are not presently entitled to compensation for the cost of sending her to a private school. *Id.*

The district court ruled on preliminary relief in this case before our recent decision in *Dataphase Systems Inc. v. C L Systems, Inc.,* No. 80-1111 (8th Cir. Jan. 7, 1981) (en banc). There we indicated that

> whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the plaintiff; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest.

Id., slip op. at 10. Although we find that the district court's analysis was not unsound, some modification of the relief granted is in order.

The district court concluded that plaintiff Rose had established a threat of irreparable harm. Although an Omaha junior high school was Marla's "then current educational placement" under the Federal Act, both sides conceded that Marla was making little progress in such placement. The district court found that the resulting harm to Marla Rose was irreparable and that preliminary relief was appropriate to limit such harm. The district court did not err in so finding. *See Bednar v. Nebraska School Activities Ass'n*, 531 F.2d 922, 923 (8th Cir. 1976); *Stuart v. Nappi*, 443 F.Supp. 1235, 1240 (D. Conn. 1978).

We also accept the district court's conclusion that Daniel Monahan did not allege a threat of irreparable harm should preliminary relief be denied. Daniel is presently enrolled at the Millard School which concededly provides an adequate educational program. In addition, the decision to place Daniel in the Millard School District was made by his parents unilaterally; they must bear the resulting tuition expense.[9] *See Stemple v. Board*

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[9]Although we find plaintiff Monahan is not entitled to compensation for tuition expense in the present circumstances, we do not reach the further question whether money damages are ever available under the Federal Act. *Compare Loughran v. Flanders*, 470 F.Supp. 110 (D. Conn. 1979) *with Boxall v. Sequoia Union High School Dist.*, 464 F.Supp. 1104 (N.D. Cal. 1979).

of Education, 623 F.2d at 897-98. Because plaintiff Monahan has not established a threat of irreparable injury, he is not entitled to preliminary relief.

The district court analyzed plaintiff Rose's claim that Neb.Rev.Stat. § 43-662 conflicts with 20 U.S.C. § 1415 (e)(1) and found that the schemes were inconsistent.[10] Thus, the court concluded that plaintiff had shown probability of success on the merits of this claim.

For a preliminary injunction to issue, however, we need not find that the state and federal statutes are inconsistent, but only that a serious question of possible conflict is raised.

> [W]here the balance of other factors tips decidedly toward [movant] a preliminary injunction may issue if [movant] has raised questions so serious and difficult as to call for more deliberate investigation.

Dataphase, slip op. at 8.[11] In the instant case, the Commissioners "review" power may conflict with the finality requirement of the Federal Act. Although we do not now

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[10]The language of the Nebraska Act gives the Commissioner of Education a role in the placement appeal procedure which may be inconsistent with the Federal Act's requirement that the hearing officer's decision "shall be final." We are unwilling to presume at this stage, however, that the Nebraska legislature enacted a statute inconsistent with federal law. It is possible that the Nebraska Supreme Court would construe the State Act in a manner consistent with section 1415. *See In re "A" Family,* 602 P.2d 157, 166-67 (Mont. 1979).

[11]As already noted, Rose has alleged an irreparable injury. There is no competing claim that the State of Nebraska, the Omaha School District, or etc., will suffer substantial injury if injunctive relief is granted. Similarly, no claim is made that a significant public interest supports denial of preliminary relief. The balance of these factors favors the plaintiff's request for an injunction.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

adopt a final construction of either act, we believe this possible inconsistency raises questions sufficient to satisfy the preliminary injunction test.

Having satisfied the elements of the *Dataphase* test, plaintiff Rose was entitled to a preliminary injunction. We conclude, however, that due to the passage of time and changed circumstances the form of relief granted should be modified. We vacate that portion of the court's order requiring a second hearing on Marla Rose's placement.

We first note that the following portion of the district court's order was stayed by this court pending a decision on appeal:

> It is further ordered that the Commissioner of Education shall appoint an impartial hearing officer who shall hold a due process hearing on Rose's complaints. The Commissioner shall abstain from engaging in any review of the hearing officer's decision and shall implement such decision without modification.

Due to the stay no second hearing has been held. We also note that the present school year is far advanced and that it may be too late for anything of substance to be achieved by another placement hearing. Moreover, a second hearing would cause additional expense and still more delay. In the circumstances, we suggest that the district court consider alternative relief.

The record establishes that the placement hearing was free from procedural error, save for the alleged impermissible review by the Commissioner. This review, however, amounted to no more than a rubber-stamp of the hearing officer's decision. It might be appropriate for the district court merely to order the Commissioner to consider the findings of the first hearing final and bind-

ing. This would avoid a time-consuming and costly duplication of the earlier hearing. The court may conclude that the best means to avoid further injury is to proceed to an early hearing and decision of all issues on the merits.[12]

In sum, we affirm the decision of the district court on the interim placement of the children. We also affirm the district court's denial of preliminary relief to plaintiff Monahan. We vacate that part of the preliminary injunction ordering a second Rose hearing, and we remand to the district court for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[12]The Federal Act expressly provides that the parties may present additional evidence pertinent to the district court's review of the placement decision. 29 U.S.C. § 1415(e)(2).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U.S. COURT & CUSTOM HOUSE
1114 Market Street
St. Louis, Missouri 63101
April 8, 1981

Robert D. St. Vrain
Clerk

Telephone Number
425-5600
Aread Code 314

Messrs. James H. Monahan and Mino St. Lucas, 623 Service Life Bldg., Omaha, NE 68102

Mr. Quintin S. Hughes, Box 369, Bellevue, NE 68005

Mr. John P. Heil, Baird, Holm, McEachen, Pedersen, Hamann & Haggart, 1500 Woodmen Tower, Omaha, NE 68102

Hon. Paul L. Douglas, Attorney General, Attn: Harold Mosher, 2115 State Capitol, Lincoln, NE 68509

Mr. James P. Miller, 2222 Farnam St., Omaha, NE 68102

Re: Nos. 80-1436/1469. James H. Monahan, etc. v. State of Nebraska, et al.

Dear Sirs:

The Court directs that each side should bear its own costs in the above cases.

Sincerely,

/s/ Robert D. St. Vrain
Clerk of Court

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1980

No. 80-1436

James H. Monahan, etc., et al,

Appellees,

vs.

State of Nebraska, et al,

Appellants.

No. 80-1469

James H. Monahan, etc.,

Appellant,

George Rose, etc.,

vs.

State of Nebraska, et al,

Appellees.

(Filed April 30, 1981)

Appeals from the United States District Court for the District of Nebraska.

These causes were heard on a designated record from the United States District Court for the District of Nebraska and on briefs of the respective parties and were argued by counsel.

After consideration, it is now ordered and adjudged that the judgment of the said District Court in these causes be, and the same are hereby, affirmed on the interim placement of the children. The District Court's denial of preliminary relief to plaintiff Monahan is af-

firmed and that part of the preliminary injunction ordering a second Rose hearing is vacated. The causes are remanded to the District Court for further proceedings consistent with the opinion of this Court.

April 1, 1981

A True Copy:

ATTEST:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

4/28/81

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL NO. 81-0-10

George P. Rose, as next friend of Marla G. Rose,

Plaintiff,

vs.

State of Nebraska, et al.,

Defendants.

James H. Monahan, as next friend of Daniel J. Monahan,
George Rose, as next friend of Marla Rose,

Plaintiffs,

vs.

State of Nebraska, et al.,

Defendants.

(Filed October 9, 1981)

MEMORANDUM AND ORDER

ROBINSON, Senior Judge.

Marla Rose[1] and Daniel Monahan are handicapped children. Marla is deaf and her speech is impaired. Daniel has muscular dystrophy, he is currently confined to a wheelchair, and is mentally retarded.

In these two actions Marla and Daniel, through their respective next of friends, challenge the validity of certain portions of the Nebraska and federal statutes which relate to the education of handicapped children. See Neb. Rev.Stat. § 43-661 - 43-668 and 20 U.S.C. § 1401 et seq. Essentially, the plaintiffs are dissatisfied with the educa-

tional placement recommended by the defendant school district. This matter is currently before the Court upon the defendants' suggestion of mootness and motion to dismiss. A hearing on defendant's suggestion and motion in both cases was held on August 25, 1981. The suggestion of mootness in each case is considered separately below.

Monahan and Rose v. State of Nebraska et al., 80-0-164.

In this action the plaintiffs pray for both injunctive relief and damages claiming that § 43-662 Neb.Rev.Stat. is inconsistent with the federal Education for all Handicapped Children Act of 1975. 20 U.S.C. §§ 1401-1420. Judge Denney granted injunctive relief to Rose but denied same to Monahan on May 16, 1980. [See Memorandum and Order Filings 19 and 20]. The parties appealed and the Eighth Circuit Court of Appeals, in an opinion reported at 645 F.2d 592 (8th Cir. 1981), affirmed in part, vacated in part, and remanded the case to the District Court. 645 F.2d at 599.

The federal Handicapped Children Act sets out various procedural requirements which states must follow in order to obtain federal funds for the education of handicapped children. These requirements protect the rights of handicapped children by establishing certain procedural safeguards. Among other things, the Federal Act requires that the parents of handicapped children be given prior written notice of any change in the educational placement of their children. If the parents are dissatisfied with the placement they are entitled to an impartial due process hearing. The Act provides, that subject to a specified appeals procedure, the decision made at the hearing is final. 20 U.S.C. § 1415.

To comply with the Federal Act, the Nebraska legislature in 1978 amended its statutes dealing with the education of handicapped children by enacting L.B. 871. That legislation includes the provision which is at issue here. Codified at § 43-662 Neb.Rev.Stat. (178), it provides that:

> The 'State' Department of Education shall conduct hearings . . . using hearing officers who shall prepare a report containing findings of facts based on the evidence presented and decisions based on such findings. After reviewing such findings and decisions the Commissioner of Education shall then recommend or direct such action as may be necessary.

The plaintiffs argued, both before Judge Denney and on appeal, that the statute conflicts with the Federal Act which requires that the due process hearing be final. They contend that the statute gives the Commissioner of Education the discretion to reject the hearing officer's findings thereby undermining their right to due process. In granting the preliminary injunction the District Court, Denney, J., found that the Nebraska and Federal Statutes were inconsistent. [Memorandum Opinion at 21. Filing #19]. While not finding that the statutes conflict, the Appeals Court concluded that the "possible inconsistency raises questions sufficient to satisfy the preliminary injunction test." 645 F.2d at 599.

That portion of the Nebraska Statute which is allegedly inconsistent with the Federal Act was deleted by the Nebraska Legislature in July, 1980. L.B. 855 deleted the portion of Neb.Rev.Stat. § 43-662 relating to the Commissioner's review of the due process hearing. *See* Neb. Rev.Stat. § 43-662 (Cum.Supp. 1980). It also specifically provides for the finality of the hearing decision subject only to judicial review. Neb.Rev.Stat. § 43-666 (Cum.Supp. 1980).

In light of the change in the Nebraska legislation, the defendants contend that the primary issue[2] in this action is now moot. They correctly point out that the challenged statute should be considered as it is currently written and not as it once appeared. *See Hall v. Beals,* 396 U.S. 45, 48 (1969); *Golden v. Zwickler,* 394 U.S. 103, 110 (1969).

The plaintiffs maintain that injunctive relief is still appropriate and that the issue is not moot because state law may again change "and the commissioner will again ignore federal law." Essentially, the argument is that the issue is not moot because it is "capable of repetition yet evading review." *Southern Pacific Terminal Co. v. I.C.C.,* 219 U.S. 498, 515 (1911). This exception to the mootness doctrine first appeared in *Southern Pacific Terminal Co.* and it has been invoked numerous times in the last seventy years. *Dunn v. Blumstein,* 405 U.S. 330 (1975); *Sec. v. Medical Comm. for Human Rights,* 404 U.S. 403 (1972); *Moore v. Ogilvie,* 394 U.S. 814 (1969). The repetition-evasion exception is appropriate, however, only where there is a possibility that the challenged conduct or law will reoccur. When there is no possibility of repetition or where the likelihood of repetition is remote and speculative the issue is moot. *Defunis v. Odegaard,* 416 U.S. 312, 317 (1974); *Hall v. Beals,* supra at 49.

In this case the possibility that the legislature will again amend the law so that it conflicts with the Federal Act is remote at best. This is particularly true since the Nebraska legislation was passed in an effort to comply with the requirements of the Federal Statute. *Nebraska Legislative Floor Debate on L.B. 871,* 85th Legis.2d Sess. 08706, 09246 (1978) (statements of Senator Koch). (Cited

in Memorandum p.4, May 16, 1980 Filing #19). This is not an appropriate case for the application of the repetition-evasion exception.

The Court finds that the recent amendment of Neb. Rev.Stat. § 43-662 and the enactment of Neb.Rev.Stat. § 43-666 moot the question of whether the Nebraska statute is inconsistent with the Federal Legislation. As amended, the Nebraska statute eliminates any discretion previously vested in the Commissioner and thereby insures the integrity of the due process hearing.

While the recent amendments to the Nebraska statutes extinguish the plaintiff's claim that the Nebraska statute is at odds with the Federal Act, there is still a question of whether the case should proceed to a determination of what damages, if any, the plaintiffs have sustained. In this regard, the defendants claim that the entire controversy is moot. They point to various developments with respect to the status and educational placement of Marla and Daniel which they contend makes further proceedings unnecessary. In determining whether any justiciable issues remain, the Court will consider the background and current status of each child.

Marla Rose

Marla Rose attended class at Beveridge Junior High School in the Omaha School District prior to the 1978-79 school year. The defendant School District notified Marla's parents in June, 1978 that it proposed to change Marla's placement from Beveridge to the Nebraska School for the Deaf. Her placement at the latter was to be on a residential basis. The proposed change in placement was based on the School District's determination that Marla

was not making any progress under the oral method of instruction. The School District decided that Marla needed instruction in both the oral method and manual method of instruction. The Nebraska School for the Deaf was chosen because it is the only school equipped to teach both methods to a person of Marla's age.

Dissatisfied with the proposed change, Marla's parents requested a due process hearing on August 14, 1978. The hearing was completed on March 23, 1979 and the hearing officer submitted his report to the Commissioner of Education on May 16, 1979. The hearing officer recommended that the Rose's appeal be dismissed because the proposed placement provided Marla the full appropriate education required by law. *See Springdale School District v. Grace,* slip op. No. 80-1777 p.7 (8th Cir. August 7, 1981). (Defining "appropriate education" under the Federal Act). The Commissioner adopted the hearing officer's report verbatim and dismissed the Rose appeal.

On June 28, 1979, Marla's father, George Rose, filed a *pro se* complaint in this Court challenging the Commissioner's decision. [CV 79-0-300]. In compliance with the Federal Act's requirement that a child's educational placement be held in status quo during litigation 20 U.S.C. § 1415(e)(3), the parties to that suit entered into a stipulation providing that Marla would attend Monroe Junior High School where Marla's studies would be practically identical to those at Beveridge. After two weeks, Marla's parents unilaterally removed her from Monroe and placed her in an unaccredited private school with no special programs for deaf children.[3] Mr. Rose's suit was dismissed for failure to join an indispensible party on November 29, 1979. On February 2, 1980 George Rose filed another ac-

tion, [CV 80-0-67], again challenging the Commissioner's decision. That suit was dismissed in October, 1980 because it was duplicative of the present action.

On May 16, 1980 Judge Denney entered an order in this case providing in part that Marla was to "be returned to her 'then current educational placement' in the Omaha Public Schools" and, absent a contrary agreement between the parties, remain there "during the pendency of all proceedings held under the Act." Order pp. 2-3, May 16, 1980 Filing #20. Marla resumed her studies in the Omaha School District on November 3, 1980. She remained in school until February 6, 1981.

Marla's eighteenth birthday was on February 3, 1981. On May 3, 1981 Marla married Timothy Corrado. Marla and her husband now reside outside the boundaries of the Omaha School District in an area served by the Millard School District.

Daniel Monahan

Daniel attended Madonna School, a private school for the mentally retarded, through the 1978-79 school year. The Omaha School District paid for Daniel's education at Madonna. In the Spring of 1979, Daniel became confined to a wheelchair. Since Madonna is not equipped to educate children confined to a wheelchair, Daniel's father, James Monahan, requested that the Millard School District recommend a new educational placement for Daniel. The Millard School District recommended that Daniel be placed in Millard's George Norris Elementary School.

The Omaha School District agreed to permit Daniel to attend George Norris but refused to finance that place-

ment because the Omaha District's Hartman School could provide Daniel with the same educational opportunity. Despite the Omaha School District's refusal to finance the George Norris placement, Daniel began attending class at George Norris in August, 1979. The cost was borne by Daniel's father.

Mr. Monahan never requested a due process hearing on the Omaha School District's refusal to finance Daniel's education. Instead, this suit was filed. The Eighth Circuit Court of Appeals held that, in light of the apparent conflict between the Nebraska statute and the Federal Act, Mr. Monahan was not required to exhaust his administrative remedies.

> We also concur with the district court's conclusion that, in the circumstances, Daniel Monahan was not required to exhaust his administrative remedies under the Nebraska Act. . . . In the present case, Monahan's claim that the state procedure on its face conflicts with the Federal Act could not be addressed effectively by the state administrative process. 645 F.2d at 597.

As of this writing, Mr. Monahan continues to finance Daniel's education in the Millard School District.

The recent amendments to the Nebraska statutes eliminate the need for injunctive relief by extinguishing plaintiffs' primary complaint. In addition to seeking an injunction, the plaintiffs also assail the hearing procedure itself and seek damages.

The plaintiff Rose raises a litany of objections to the administrative hearing on Marla's educational placement and urges the Court to review that placement. While the Federal Act does provide for judicial review of the

placement decision 20 U.S.C. § 1415(e)(2), the Court declines to undertake such a review in this case. Marla Rose has not attended class in the Omaha School District since February 6, 1981. Her failure to remain in school is in direct contravention of Judge Denney's Order requiring that Marla remain in her "current educational placement" throughout these proceedings.[4] In addition to her absence from school, Marla, by virtue of her marriage, is emancipated Neb.Rev.Stat. § 38-101 and currently resides outside the boundaries of the Omaha School District. Because of Marla's change in residence and her emancipation, the Omaha School District no longer has responsibility for Marla's education. Marla's educational placement must now be determined by the Millard School District—the district in which she currently resides. *State ex rel. Rittenhouse v. Neuman*, 139 Neb. 657, 204 N.W.2d 372 (1973); *Russell v. State*, 62 Neb. 512, 87 N.W. 344 (1901). In short, a review by the Court of Marla's prior placement would be superfluous.

While Marla has indicated that she desires to continue her education and that she plans to move back into the Omaha School District [See Filing #49 CV 81-0-10 and Filing #40 CV 80-0-164], the fact remains that she has not attended school for nearly eight months and continues to reside outside the district. To ignore Marla's emancipation and change in residence and consider the merits of her prior placement would require the Court to render what would amount to an advisory opinion. Such an opinion would do more than decide the abstract proposition of what placement would be proper if Marla did reside in the Omaha School District. The Court will not engage in such an undertaking on the chance that Marla might

return to her former school district. *See Cass County v. United States,* 570 F.2d 737 (8th Cir. 1978).

Even if there had been no change in Marla's status, the Court would be reluctant to consider the alleged infirmities in the placement hearing. The Appeals Court observed that "the placement hearing was free from procedural error save for the alleged impermissible review by the Commissioner." 649 F.2d 599. The essence of this dispute is a disagreement between Marla's parents and the Omaha School District regarding Marla's proper educational placement. Such a disagreement does not itself lead to the conclusion that there was some defect in the hearing procedure. Marla's parents have already had the benefit of a due process hearing. The only colorable defect in the hearing procedure was the Commissioner's review. That review amounted to nothing more than the Commissioner adopting the hearing officer's decision verbatim. Any violation of due process resulting from the Commissioner's review was, like Narcissus' reflection, illusionary.

The plaintiff Rose also raises a claim for damages. If damages are ever recoverable under the Federal Act—an issue the Eighth Circuit expressly did not decide[5]—there is no basis for making any award here. Rose certainly sustained no damage from the Commisioner's unequivocal endorsement of the hearing officer's decision. Nor can Marla's parents recover the tuition for sending her to a private school. The decision to withdraw Marla from the Omaha School District was made solely by Marla's parents. Faced with a similar situation, the Fourth Circuit observed in *Stemple v. Board of Education,* 623 F.2d 893, 897 (4th Cir. 1980) that:

> [The Federal Act] creates a duty on the part of parents who avail themselves of the hearing and review provisions of § 615 to keep their child in his current educational assignment while the hearing and review provisions are pending. . . . Of course, that duty may not be totally enforceable by the state, but it certainly negates any right on the part of parents, in violation of the duty and in the absence of agreement, to elect arbitrarily to place their child in a private school and recover the tuition costs thus incurred.

The Eighth Circuit Court of Appeals cited *Stemple* with approval, finding that Marla's parents were "not presently entitled to compensation for the cost of sending her to a private school." 645 F.2d at 598. Under the circumstances, no damages are recoverable.

Marla is now emancipated and living outside the Omaha School District. As a result, further proceeding on her proper placement in that district would be pointless. The primary issue raised by this action has been mooted by the amendments to the Nebraska Statutes. Accordingly, the Court finds that as to the plaintiff Rose this action is moot and should be dismissed.

The plaintiff Monahan did not exhaust his administrative remedies. Rather he brought this action seeking a judicial determination of Daniel's proper educational placement. Monahan was not required to exhaust the available state remedies *solely* because of the alleged inconsistency between the state and federal statutes. 645 F.2d at 597. That inconsistency has now been rectified and there is no longer any justification for permitting Monahan to circumvent the state procedure. The stat's hearing officer is in the best position to make an initial determination on Daniel's proper placement. And, there is no reason

to believe that the state cannot or wil not proceed in an expeditious manner if Mr. Monahan opts for a due process hearing.

The whole tenor of the Federal Act indicates that judicial review is appropriate only after the state has made a final placement decision. The Second Circuit Court of Appeals in *Riley v. Ambach,* Slip Op. No. 80-7600 (2d Cir. May 19, 1981) reversed a district court's decision to enjoin various regulations promulgated by state school officials relating to the classification and placement of handicapped children. Finding that the plaintiffs should have been required to exhaust their administrative remedies, the Court observed that:

> A strong state interest is reflected in the establishment of a comprehensive scheme of regulation; authority over the subject matter of the dispute has been vested in an expert supervisory body, far more familiar than a Federal Court with local factors that legitimately affect administration. [Citations omitted]. If the expert agency cannot resolve the problem finally, the record made in the administrative proceedings will be extremely helpful to the court, since the administrative agency will likely have probed the issue with more expertise than a federal court could bring to bear, and therefore, have illuminated the issue for final decision in the federal court.

Slip Op. at pp. 5-6. This consideration is particularly important in the present case. A determination on the merits of the Monahan complaint would undoubtedly require a comparison and evaluation of the programs available at the Hartman and George Norris schools. This Court has no particular expertise in determining which school can best meet the needs of Daniel Monahan. That issue is best resolved, at least initially, by the state. The Court concludes that the plaintiff Monahan must exhaust his

administrative remedies before seeking further judicial relief. See, *Ezratty v. Commonwealth of Puerto Rico,* 648 F.2d 770 (1st Cir. 1981).

Parenthetically, it should be noted that Monahan is not entitled to any damage award. That issue was, for all practical purposes, disposed of by the Eighth Circuit. "[T]he decision to place Daniel in the Millard School District was made by his parents unilaterally; they must bear the resulting tuition expense." 645 F.2d at 598.

Rose v. State of Nebraska, et al CV 81-0-010.

This case presents essentially the same issues considered in CV 81-0-164. Their resolution in the previous discussion is applicable here. The plaintiff Rose does raise one additional issue. Namely, Mr. Rose alleges that the hearing officer erred in his disposition of case No. 80-06. That action was filed by Mr. Rose before the Nebraska Department of Education. It again challenged the educational placement of Marla Rose. The hearing officer dismissed Rose's petition because Judge Denney's Order in CV 80-0-164, requiring that Marla remain in her current educational placement, was in effect. See *Rose v. School District of Omaha,* Decision and Order p. 13 Case No. 80-06 (Dept. of Ed. Dec. 8, 1980).

Given the status of Marla's placement at the time, the hearing officer's decision was proper. More important for purposes of this action is Marla's change in status. Since Marla is now married and residing outside the Omaha School District, the hearing officer's decision is moot.

In short, the Court finds that the questions presented in CV 80-0-10 are duplicative of those raised in CV 80-0-164 and are mooted by Marla's decision to marry and move outside the Omaha School District.

THEREFORE,

IT IS ORDERED that defendants' motion to dismiss CV 80-0-164 and CV 80-0-010 is sustained. CV 80-0-164 and CV 80-0-010 are accordingly dismissed without prejudice.

Dated this 9th day of October, 1981.

BY THE COURT:

/s/ Richard E. Robinson
Senior Judge, United States
District Court

FOOTNOTES

[1]Marla Rose was married to Timothy Corrado on May 3, 1981. For clarity, she is referred to here by her maiden name.

[2]Both the District Court and the Court of Appeals characterized the question of whether the Nebraska legislation conflicts with the Federal Act as the primary issue in the case.

See Memorandum p.3, May 16, 1980 Filing #19; *Monahan v. Nebraska*, 645 F.2d 592, 595 (8th Cir. 1981).

[3]The parties agree that neither Monroe nor the private school provided Marla with an appropriate education. Memorandum p. 6, May 16, 1980 Filing #19.

[4]The parties never agreed to any change in Marla's placement. Under the terms of Judge Denney's Order of May 16, 1980 such an agreement was required to alter Marla's educational placement.

[5]In a footnote the Court said "we do not reach the . . . question whether money damages are ever available under the Federal Act." 654 F.2d at 598 n.9. (Citations omitted).

The Seventh Circuit, however, recently considered the damage issue in *Anderson v. Thompson*, Slip Op. No. 80-2364 7th Cir. Sept. 8, 1981. The Court affirmed the district court's denial of a damage award. "We hold that Congress, though including within the [Federal Act] a private right of action which authorizes district courts to award appropriate relief, did not intend to provide an award of money damages in the absence of exceptional circumstances."

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2106

James H. Monahan, as next friend of Daniel J. Monahan, George Rose, as next friend of Marla Rose,

Appellants,

v.

State of Nebraska, Charles Thone, Governor of The State of Nebraska, Board of Education, School District #1, Douglas County, Nebraska, Owen Knutzen, Individually, and as Superintendent of School District #1, Douglas County, Nebraska, Dale Samuelsen, Individually, and as Assistant Superintendent in Charge of Special Education, of School District #1, Douglas County, Nebraska, Anne Campbell, Commissioner of Education for the State of Nebraska, State Board of Education, Walter M. Thompson, Individually, and as a Member of the State Board of Education, Margaret Lockwood, Individually, and as a Member of the State Board of Education, Frank E. Landis, Individually, and as a Member of the State Board of Education, Don M. Lienemann, Individually, and as a Member of the State Board of Education, Dorothy Creigh, Individually, and as a Member of the State Board of Education, Arlene E. Hart, Individually, and as a Member of the State Board of Education, William C. Ramsey, Individually, and as a Member of the State Board of Education, Dorothy Beaver, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, June Bostwick, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Walter Calinger, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Pat Geringer, Indi-

vidually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Leo Hoffman, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Gaynelle Goodrich, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Ruth Thomas, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Frank Bogard, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, McGruder, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, James A. Monaghan, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, James Beutel, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Leo Kastrick, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska,

Appellees.

On Appeal from the United States District Court for the District of Nebraska

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No. 81-2196

George P. Rose, as next friend of Marla Rose,

Appellant,

v.

State of Nebraska, Charles Thone, Governor of The State of Nebraska, Board of Education, School District #1, Douglas County, Nebraska, Owen Knutzen as Superintendent of School District #1, State Board of Education for the State of Nebraska, Anne Campbell, Individually, and as Executive Officer for the State Board of Education, State Department of Education for the State of

Nebraska, Anne Campbell, Administrative Head of the State Department of Education, Anne Campbell, Commissioner of Education for the State of Nebraska, Patricia Harris, Secretary of HEW, Edward W. Martin, Office of Special Education, U.S. Department of Education, U.S. Department of Health, Education, and the U.S. Department of Education,

Appellees.

Submitted: May 19, 1982

Filed: August 30, 1982

Before McMILLIAN, Circuit Judge, MARKEY,* Chief Judge, and ARNOLD, Circuit Judge.

ARNOLD, Circuit Judge.

James Monahan and George Rose brought these actions on behalf of their handicapped children, Daniel Monahan and Marla Rose, now Marla Corrado.[1] The complaints pleaded claims arising under the Education for All Handicapped Children Act of 1975 (EAHCA), 20 U.S.C. § 1401 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and 42 U.S.C. § 1983. The principal issue in this case, at least at its inception, has been the validity of the Nebraska statutory procedure for

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*The Hon. Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

[1]For a full statement of the facts, the reader is referred to the District Court's opinion on preliminary relief, *Monahan v. Nebraska*, 491 F.Supp. 1074 (D. Neb. 1980), and to this Court's opinion on appeal therefrom, 645 F.2d 592 (8th Cir. 1981), as well as to the District Court's opinion on remand, *Rose v. Nebraska*, 530 F.Supp. 295 (D. Neb. 1981), from which the instant appeal is taken.

administrative appeals from placement decisions made by school officials. Plaintiffs claimed that Nebraska law as it existed when their complaints were first filed, Neb. Rev. Stat. § 43-662 (1978), gave the State Commissioner of Education the power to review conclusions reached by hearing officers on administrative appeals filed by dissatisfied parents. This power of review, it was argued, is in conflict with EAHCA itself, under which a decision made by an impartial hearing officer is final. After remand from this Court's decision on the prior appeal, having to do with preliminary relief, the District Court[2] dismissed the complaints as moot because the allegedly offending provisions of state law had been amended to make it clear that the Commissioner of Education could not change a decision made by a hearing officer. L.B. 855, effective July 19, 1980, now codified as Neb.Rev.Stat. § 43-662 (Cum. Supp. 1980), made this change. The District Court discussed other issues raised by the complaints and ultimately decided to dismiss them without prejudice.

Plaintiffs [Printer's Note: this line is unreadable] repeal of the challenged statute does not make the case moot. For the most part, we affirm, but we do remand for consideration of an award of attorney's fees to the plaintiff Rose.

I.

The question whether plaintiffs' original attack on the alleged inconsistency between Nebraska law and EAHCA is now moot need not detain us long. The in-

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[2]The Hon. Richard E. Robinson, Senior United States District Judge for the District of Nebraska.

consistency has disappeared, and there is no measurable possibility that it will ever recur. To pursue the issue now would be to render an advisory opinion, which we may not do under Article III of the Constitution. For the reasons ably set forth by the District Court, the question of conflict between the state and federal laws is no longer a live controversy. See *Rose v. Nebraska,* 530 F. Supp. 295, 298-99 (D. Neb. 1981). Plaintiffs make certain other complaints about the Nebraska procedure implementing EAHCA, but these questions were resolved against them by this Court on the prior appeal. "The record establishes that the placement hearing was free from procedural error, save for the alleged impermissible review by the Commissioner." *Monahan v. Nebraska,* 645 F.2d 592, 599 (8th Cir. 1981). So far as prospective injunctive relief aaginst the operation of the Nebraska statutory scheme is concerned, this case is moot.

II.

Even though the plaintiffs' attacks on the Nebraska procedural scheme for reviewing EAHCA complaints are moot, however, plaintiffs might still be entitled to review of the substantive decision made in the placement of their children, and they so contend on this appeal. We agree with the District Court that these issues are also moot. Marla Rose became 18 years of age on February 3, 1981, and on May 3, 1981, she married Timothy Corrado. Under Neb. Rev. Stat. § 38-101 (1978), Marla's minority ended with her marriage, and her residence therefore no longer automatically follows that of her parents. She and her husband have moved out of the Omaha School District, which was the principal defendant

below, and, since February 6, 1981, Marla has voluntarily ceased attending classes. She now lives in another school district and does not attend school. While she has stated that she plans to move back to the Omaha School District and continue her education, we are not told when this will occur. Whether it will ever actually happen is speculative, and therefore the issues she raises about her proper educational placement are not yet ripe for adjudication. Given these circumstances, it would be improper for us to address her requests for declaratory and injunctive relief. See *DeFunis v. Odegaard,* 416 U.S. 312 (1974).

The plaintiff Monahan contends that the question of his son, Daniel's proper placement is not moot. Mr. Monahan wants this Court to direct the Omaha School District to contract with the Millard School District, School District No. 17, so that Daniel can attend the Developmental Center at the George Norris School, within the Millard School District, at the expense of the Omaha School District. As to this claim, we again agree with the District Court that relief is barred, not because of mootness, but because of failure to exhaust administrative remedies. Monahan never invoked the impartial hearing process provided by state law. On the prior appeal, we excused his failure to exhaust because of his contention, which undoubtedly had substance, that the procedures provided by Nebraska statutes were in conflict with federal law. It would make no sense to require someone to exhaust an administrative remedy when his very contention is that the remedy provided is unlawful. As we stated on the prior appeal 645 F.2d at 597: "Although the federal framework mandates initial resort to the

state administrative process, 20 U.S.C. § 1415(e)(2), exhaustion is not required where it would be futile or where the administrative remedy would be inadequate. . . . In the present case, Monahan's claim that the state procedure on its face conflicts with the Federal Act could not addressed effectively by the state administrative proc-s."

The claimed defect in state law has now, as we have explained above, been cured, and Monahan can no longer successfully contend that state administrative remedies fail to comply with EAHCA. He must therefore exhaust those remedies before he can ask a federal court to direct for his child a different placement from that thought best by the school authorities. We note that Monahan, himself a member of the State Board of Education, must have known as early as July, 1980, that state law was being changed to comply with EAHCA. In addition, the record contains a letter addressed to Mr. Monahan, dated August 27, 1980, specifically advising him that state law had been changed and instructing him in detail how to avail himself of the administrative process provided by the state. Monahan made no move to seek administrative review of the placement decision which he now asks us to correct. In these circumstances we may not proceed with his claim, to the extent that he seeks prospective injunctive relief affecting his son's educational placement in the future.

III.

Plaintiffs also press their claim for damages, which, to the extent that it is based on an allegedly substantively improper educational placement, as opposed to claimed

procedural defects in the Nebraska statutes, would not be mooted by the change in state law. The District Court, citing *Stemple v. Board of Education,* 623 F.2d 893, 897 (4th Cir. 1980), held that damages are not recoverable for the costs of tuition at a school voluntarily selected by parents. We cited *Stemple* approvingly in our first opinion in this case, 645 F.2d at 598, and we have now held, in any event, that there is no private right of action for damages under EAHCA, except perhaps in exceptional circumstances not present here. *Miener v. Missouri,* 673 F.2d 969, 979-80 (8th Cir. 1982).

Plaintiffs correctly point out, however, that their complaints also relied on § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and we have now held, *Miener v. Missouri, supra,* 673 F.2d at 977-79, that there is a private right of action for damages under § 504, and that "§ 504 suits appropriately may be maintained in advance of the exhaustion of administrative remedies." *Id.* at 978 (footnote omitted). *Miener* was handed down several months after the District Court's opinion now being reviewed, and so necessarily raises issues that court did not consider.

We therefore turn to the allegations of plaintiffs' complaints[3] to determine what they are claiming with re-

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[3]We use the plural—"complaints"—because while the first appeal was pending Rose filed a new civil action in the District Court, No. 81-0-10 (now No. 81-2196 in this Court), primarily for the purpose of challenging a hearing officer's dismissal of an administrative appeal filed while the District Court's order that Marla be kept in the interim placement specified by the school district was still in effect. We agree with the District Court that No. 81-0-10 was duplicative of No. 80-0-164 (now No. 81-2106 in this Court), the case originally brought by Monahan and Rose together.

spect to the Rehabilitation Act, as opposed to EAHCA. We are left with many questions. Obviously the pleaders' main reliance was on EAHCA. Paragraph 2 of the original complaint, D.R. 2, alleges that "[t]his action is brought pursuant to the provisions of P.L. 94-142, The Education for All Handicapped Children Act." The gravamen of the complaint is that Nebraska has failed to provide for an impartial, "due process" hearing at which parents may contest educational placements, in violation of EAHCA. This procedural question is now moot, for reasons we have already described, and plaintiffs' other procedural complaints about the Nebraska statutory process are completely without merit. There are references in the complaints to § 504 of the Rehabilitation Act, but they are obscure, to say the least. We have read and reread these pleadings, and the claims of violation of § 504 seem to rest on the same procedural theories that plaintiffs have unsuccessfully urged under EAHCA. References to 42 U.S.C. § 1983 are even more cryptic and seem to have been included as another means of making the same procedural arguments. We are not persuaded, on the record before us, that it was error to dismiss these complaints without prejudice.

Our affirmance of a dismissal without prejudice technically leaves the way open to a re-filing of these cases on a new complaint. We have no wish to breed litigation that will do no one any good, so we add a few words for the guidance of the District Court and the parties if the matter is pursued. The Rehabilitation Act and EAHCA are entirely different statutes. EAHCA imposes an affirmative duty on recipients of federal funds to provide a free, appropriate education for handicapped children.

The Supreme Court has recently explained the extent of this duty. *Board of Education v. Rowley,* 50 U.S.L. Week 4925 (U.S. June 28, 1982). EAHCA is primarily a procedural statute, as the Supreme Court now seems to have construed it. It does impose a substantive duty, but only to afford an adequate education, not necessarily the kind of education necessary to maximize each handicapped child's personal development. Most questions of educational theory and methodology are left to the state's educational authorities. The Rehabilitation Act, on the other hand, is both broader and narrower than EAHCA. It is broader in the sense that it applies to a wide range of federally funded activities, not just to education. It is narrower in that it is not, generally speaking, an affirmative-action statute. "[N]either the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." *Southeastern Community College v. Davis,* 442 U.S. 397, 411 (1979) (footnote omitted). Section 504, instead, is simply a prohibition of certain conduct on the part of recipients of federal financial assistance.

The Section reads, in pertinent part, as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

The language of the statute is instructive. It prohibits exclusion, denial of benefits, and discrimination "solely

by reason of . . . handicap." Manifestly, in order to show a violation of the Rehabilitation Act, something more than a mere failure to provide the "free appropriate education" required by EAHCA must be shown. The reference in the Rehabilitation Act to "discrimination" must require, we think, something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist. Experts often disagree on what the special cares of a handicapped child are, and the educational placement of such children is often necessarily an arguable matter. That a court may, after hearing evidence and argument, come to the conclusion that an incorrect evaluation has been made, and that a different placement must be required under EAHCA, is not necessarily the same thing as a holding that a handicapped child has been discriminated against solely by reason of his or her handicap. An evaluation, in other words, is not discriminatory merely because a court would have evaluated the child differently.

We do not read § 504 as creating general tort liability for educational malpractice, especially since the Supreme Court, in interpreting the EAHCA itself, has warned against a court's substitution of its own judgment for educational decisions made by state officials. We think, rather, that either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of education of handicapped children. It is our duty to harmonize the Rehabilitation Act and the EAHCA to the fullest extent possible, and to give each of these statutes the full play intended by Congress. The standard of liability we suggest here accomplishes this result and also reflects what we believe to be a proper

balance between the rights of handicapped children, the responsibilities of state educational officials, and the competence of courts to make judgments in technical fields. So long as the state officials involved have exercised professional judgment, in such a way as not to depart grossly from accepted standards among educational professionals, we cannot believe that Congress intended to create liability under § 504.

The application of this standard to the complaints in this case as they now stand can yield only one result. After the claims of EAHCA violations and procedural inconsistencies between the Nebraska statute and EAHCA are laid to one side, nothing of substance in the way of allegations of fact remains, certainly nothing that could be said to amount to a charge of "discrimination" against either Marla Rose or Daniel Monahan. We therefore conclude, though for reasons somewhat different from those given by the District Court, that it was not error to dismiss the complaints without prejudice. What the Supreme Court has recently said in another context has some application here. "For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg v. Romeo,* 50 U.S.L. Week 4681, 4685 (U.S. June 18, 1982) (footnotes omitted) (§ 1983 action against medical professionals).

IV.

It remains to consider plaintiffs' claim that this case is not moot because they are still entitled to an award of

attorneys' fees, even if all of their substantive claims have now been properly disposed of. The question of attorneys' fees was not explicitly addressed by the District Court, but that Court's order dismissing the complaints must be taken to have implicitly rejected any suggestion that fees should now be awarded. We are partly in agreement. As to the plaintiff Monahan, we see no reason for award of attorney's fees or costs. The preliminary injunctive relief that he initially requested was denied by the District Court, and this denial was affirmed on his appeal to the Court of Appeals. *Monahan v. Nebraska, supra,* 645 F.2d at 598. It is clear, therefore, that Monahan has not prevailed on any claim, and he is therefore not entitled to attorney's fees, either under the Rehabilitation Act or 42 U.S.C. § 1988.

We think the situation is otherwise as to the plaintiff Rose. The District Court initially granted Rose's motion for a preliminary injunction. Defendants point out that this Court, on the first appeal, vacated that portion of the District Court's order requiring a second hearing on Marla Rose's placement. We are urged, therefore, to conclude that Rose, like Monahan, was not a prevailing party on the first appeal. We disagree. Although the precise form of relief granted by the District Court was vacated by this Court, we did not reject outright Rose's request for preliminary relief. We held only that "due to the passage of time and changed circumstances the form of relief granted should be modified." *Monahan v. Nebraska, supra,* 645 F.2d at 599. The case was remanded for the District Court to determine what relief might be appropriate. In addition, in the course of our opinion on the first appeal we agreed with the District Court that "the resulting harm to Marla Rose was irreparable and

that preliminary relief was appropriate to limit such harm." *Id.* at 598. We think Rose was a prevailing party in these circumstances. It is true that only preliminary relief was involved, but this is not a case where Rose prevailed at the preliminary injunction stage, only to lose later on the merits. The dismissal of Rose's complaint after the remand was principally on the ground of mootness, not on the ground that the Nebraska statutory scheme, as it originally existed when this action was first instituted, was in fact in compliance with federal law.

The initial proceedings in the District Court and on the first appeal to this Court were, it is true, based primarily on the EAHCA, and that statute contains no provision for attorneys' fees. Rose's complaint, however, also claimed, among other things, that the injection of the Nebraska Commissioner of Education into the hearing process prevented that process from being impartial, in violation of the Due Process Clause of the Fourteenth Amendment. A claim of that kind, of course, can be the basis for an action under 42 U.S.C. § 1983, and parties who prevail in actions to enforce § 1983 are, in the usual case, entitled to an award of attorneys' fees under 42 U.S.C. § 1988. It does not matter that the constitutional, or § 1983, ground was not actually reached, and that the complainant prevailed, to the extent that he did at all, on his EAHCA ground. Where a non-fee claim is joined with a non-frivolous claim under a statute providing for the award of fees, and the plaintiff prevails with respect to his non-fee claim, thus making it unnecessary for the Court to reach the § 1983 claim, an award of fees is nevertheless appropriate. See *Robert M. v. Benton*, 671 F.2d 1104 (8th Cir. 1982), a case with some similarities to the present one.

Accordingly, although we affirm the District Court's dismissal of these complaints in most respects, a remand is appropriate for the limited purpose of determining the proper amount of attorney's fees and costs to be awarded to the plaintiff Rose, the fees and costs involved to be limited to those incurred up through the decision by this Court on the first appeal. Ordinarily this Court determines the proper amount of attorneys' fees to be awarded for services rendered before it, but since the appeal with respect to which the plaintiff Rose substantially prevailed was before another panel of this Court, we think the most expeditious way of handling the matter in the present situation is for the District Court, on remand, to determine the proper amount of fees and costs to be awarded both for services rendered before it at the preliminary-injunction stage of the case, and for services rendered before this Court on the first appeal.

V.

The judgment of the District Court, dismissing the complaints without prejudice, is affirmed, except to the extent that it rejects the claim of the plaintiff Rose for an award of attorney's fees and costs. In this limited respect, the judgment of the District Court is vacated, and the cause remanded to that Court for further proceedings consistent with this opinion.

Affirmed in part, vacated in part, and remanded.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX H

(Filed September 7, 1982)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

September 3, 1982

Robert D. St. Vrain
Clerk

Telephone Number
425-5600
Area Code 314

Hon. Paul L. Douglas, AG

Attn: Harold Mosher

Mr. John P. Heil

Mr. Quintin S. Hughes

Mr. Mino St. Lucas

Mr. David J. Ryan, AUSA

Ms. Marlo G. Corrado

Mr. George P. Rose

Re: Nos. 81-2106/2196. George Rose, et al v. State of Nebraska.

Dear Counsel:

The Court directs that each party is to bear its own costs in these cases.

Sincerely,

/s/ Robert D. St. Vrain per eh
Clerk of Court

eh

APPENDIX I

CIVIL NO. 80-0-164

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed November 10, 1983)

James H. Monahan, as next friend of Daniel J. Monahan,

George Rose, as next friend of Marla Rose,

Plaintiffs,

vs.

State of Nebraska, Charles Thone, Governor of the State of Nebraska, Board of Education, School District No. 1, Douglas County, Nebraska, et al.,

Defendants.

MEMORANDUM AND ORDER

APPEARANCES: For Plaintiff Rose: Quintin S. Hughes, Bellevue, Nebraska; James H. Monahan, William L. Monahan, Mino St. Lucas, Omaha, Nebraska.

For Defendants: John P. Heil, Baird, Holm Law Firm, Omaha, Nebraska, Harold Mosher, Nebraska, Department of Justice

ROBINSON, Senior Judge.

THIS MATTER is before the Court on the motion of plaintiff Rose for an award of attorney's fees and costs under 42 U.S.C. Section 1988. (Filing 50). This case has generated voluminous judicial work product in its lengthy

passage through the courts of this circuit. *See Monahan v. State of Nebraska,* 491 F.Supp. 1074 (D.Neb.1980), *aff'd in part, vacated in part and remanded,* 645 F.2d 592 (8th Cir. 1981), *on remand,* 530 F.Supp. 295 (D.Neb.1981), *aff'd in part, vacated in part and remanded,* 687 F.2d 1164 (8th Cir.1982).

In remanding the case to this Court for a determination of attorney's fees and costs, the court of appeals made the following comments:

> [a]lthough we affirm the District Court's dismissal of these complaints in most respects, a remand is appropriate for the limited purpose of determining the proper amount of attorney's fees and costs to be awarded to the plaintiff Rose, the fees and costs involved to be limited to those incurred up through the decision by this Court on the first appeal.

687 F.2d at 1172. Because the court of appeals specifically found that plaintiff Rose was a prevailing party within the meaning of 42 U.S.C. Section 1988, it is unnecessary for this Court to reach that issue. Despite the circuit court's holding, however, the defendants maintain that Rose did not prevail on any issue raised by the parties in this action. The defendants argue that the rationale of the court of appeals has been seriously undermined by the Supreme Court's recent decision in *Hensley v. Eckerhardt,* — U.S. —, 103 S.Ct. 1933 (1983). Although the defendants' contentions certainly have some merit, the Court does not believe that the *Hensley* case requires it to disregard the decision of the court of appeals.[1] This Court must, therefore, determine the amount of attorney's fees and costs to which plaintiff Rose is entitled.

I.

BACKGROUND

The determination of a fair and reasonable fee is complicated in this case by the presence of four attorneys who each claim to have provided legal services for plaintiff Rose. Each has submitted a fee request with supporting affidavits, as follows:

Quintin S. Hughes	329.6 hours x $75.00/hour = $24,720
James H. Monahan	238.5 total hours (approximately one-half claimed as direct benefit to Rose preliminary injunction) 119.25 hours x 100.00/hour = $11,925.00.
James P. Miller	22 total hours (approximately one-half claimed as direct benefit to Rose preliminary injunction) 11 hours x $100/hour = $1100.00.
Mino St. Lucas	102.5 total hours (approximately one-half claimed as direct benefit to Rose preliminary injunction) 51.25 hours x $100.00 = $5125.00.
	TOTAL $42,870.00.

In addition, Rose seeks to recover $12,486.69 as a fee for the time expended on his behalf by Mr. Michael Levy at a due process hearing before the Nebraska Department of Education.

To a certain extent, these initial calculations were altered by the evidence presented in the hearing before this Court. First, Mr. Hughes acknowledged that his customary fee at the time of the preliminary injunction hearing and first appeal was $50.00. Second, Mr. Levy testified that, in his opinion, $75.00 per hour was fair and reasonable

compensation for a federal court action. This testimony belies the $100 per hour rate charged by attorneys Monahan, Miller and St. Lucas. Finally, Rose's other expert witness, Mr. Edward Fogarty, testified that the case could have been optimally tried and appealed in 250 hours. Mr. Fogarty also applied a formula derived from the Code of Professional Responsibility—specifically DR2-106(B)—by which he determined that a fee of $135 per hour would furnish reasonable compensation in the circumstances of this case. Under this formula, Rose's counsel would receive a fee of $33,750.00.

The Court is troubled by the appearance of four attorneys seeking fee awards for the representation of plaintiff Rose. The court of appeals specifically found that only Rose was entitled to attorney's fees and costs. *Monahan v. State of Nebraska,* 687 F.2d 1164, 1171 (8th Cir. 1982) ("It is clear—that Monahan has not prevailed on any claim, and he is therefore not entitled to attorneys's fees. . . ."). Moreover, Quintin Hughes is the only attorney who has formally appeared before this Court on behalf of Mr. Rose. The other attorneys nevertheless maintain that they agreed with Mr. Hughes to pool their efforts and that a part of the time they spent on the case directly contributed to Rose's success. This Court cannot agree. Although the attorneys jointly signed and submitted some of the pleadings and briefs filed in this action, the participation of Messrs. Monahan, Miller and St. Lucas was the result of a purely private arrangement for the sharing of research, information and advice. The Court will only consider the fee request of Quintin Hughes.

II

A. *The Fee Request.*

In *Hensley v. Eckerhardt, supra,* the Supreme Court clarified the principles that guide the district court's discretion in awarding attorneys' fees under 42 U.S.C. Section 1988. In *Hensley,* the Court vacated the judgment of the court of appeals and remanded the case to the district court, holding that the latter had failed to properly consider the relationship between the extent of the plaintiff's success on the merits and the amount of the fee awarded. 103 S.Ct. at 1942-43. The Court explained that the "most useful starting point for determining the amount of a reasonable fee is the number of hours *reasonably expended* on the litigation multiplied by a reasonable hourly rate." *Id.* at 1939. (emphasis added). The district court should exclude from this initial formula any hours that were not "reasonably expended." *Id.* Hence, the product of reasonable hours times a reasonable rate represents the basic or "lodestar" figure. *See Avalon Cinema Corp. v. Thompson,* 689 F.2d 137, 139 (8th Cir. 1982) (en banc). In the present case, Mr. Hughes has submitted at least three different lodestar rates: $75.00 (in his pre-hearing affidavit); $60.00 (from the testimony of Edward Fogarty); and $50.00 (during Hughes' testimony and, later, in his post-hearing brief to this Court). Furthermore, although Mr. Hughes' timesheets indicate that he spent a total of 329.6 hours on this case, Mr. Fogarty testified that the work could have been performed in 250 hours.

The *Hensley* Court, 103 S.Ct. at 1940 n. 9, recognized that the district court could consider the following well-established guidelines in determining the lodestart figure:

> (1) the time and labor required, (2) the novelty and difficulty of the question, (3) the skill requisite to perform the legal services properly, (4) the preclusion of other employment due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client and (12) awards in similar cases.

See Zoll v. Eastern Allamakee School District, 588 F.2d 246, 252 n. 11 (8th Cir. 1978) (citing the leading decision of *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974)), *see also Jaquette v. Black Hawk County,* 710 F.2d 455, 459 (8th Cir. 1983). In view of the principles identified above, and after a thorough examination of Mr. Hughes' timesheets, the Court finds that: (1) Mr. Hughes "reasonably expended" 265 hours representing plaintiff Rose through the first appeal; (2) $60 per hour is a reasonable basic rate for these services. Thus, the "lodestar" figure is $15,900.

In *Hensley, supra,* the Supreme Court declared that a prevailing plaintiff's "degree of success" is the "most critical factor" to be weighed by the district court in determining a reasonable attorney's fee. 103 S.Ct. at 1941. The Court explained that "[i]f . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* The Court concluded that "[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Id.*

at 1943. Hence, the district court may reduce the fee award below the lodestar figure by either identifying "specific hours that should be eliminated," or by merely deducting a fixed amount or percentage from the lodestar "to account for the limited success." *Id.* at 1941; *see also Jaquette v. Black Hawk County, supra,* 710 F.2d at 458 n. 7.

In the complaint, plaintiffs Rose and Monahan asked the Court to declare that the Nebraska Department of Education had violated their rights under the Education of All Handicapped Children Act ("EAHCA"), and that the defendants' actions had denied them their rights to due process and equal protection of the laws. The plaintiffs further sought the appointment of a "master" to oversee the state Commissioner of Education, and a mandatory injunction to secure appropriate placement in special education classes for Marla Rose and Daniel Monahan. On a motion for a preliminary injunction, Judge Denney analyzed the pertinent factors and determined that the plaintiffs had raised a serious question as to the conflict between the Nebraska EAHCA hearing procedures, Neb.Rev.Stat. Section 43-662, and the controlling federal scheme. *Monahan v. State of Nebraska, supra,* 491 F. Supp. at 1093. Judge Denney found, however, that only Marla Rose was entitled to a preliminary injunction. 491 F.Supp. at 1094. Judge Denney entered an order that included the following provisions:

> IT IS FURTHER ORDERED that Marla Rose be *returned* to her "then current educational placement" in Omaha Public Schools. The cost of this placement shall be borne by the Omaha School District. Unless the parties agree otherwise, this placement shall con-

> tinue during the pendency of all proceedings held under the Act.
>
> IT IS FURTHER ORDERED that the Commissioner of Education shall appoint an impartial hearing officer who shall hold a due process hearing on Rose's complaints. The Commissioner shall abstain from engaging in any review of the hearing officer's decision and shall implement such decision without modification. (Filing 20).

The latter provision was especially significant because it clearly reflected Judge Denney's view that the Nebraska hearing procedure conflicted with the federal act. However, the court of appeals stayed this section of the order pending the first appeal (Filing 31), and, on remand, this Court dismissed the action as moot. *Rose v. State of Nebraska, supra.* No hearing was ever held.

Judge Denney's decision to order a due process hearing for Marla Rose was a significant victory for the plaintiffs. Yet, the success was short-lived. The court of appeals not only stayed this critical portion of the preliminary injunction, but, even more importantly, it later urged this Court to consider alternative relief:

> The record establishes that the placement hearing was free from procedural error, save for the alleged impermissible review by the Commissioner. This review, however, amounted to no more than a rubberstamp of the hearing officer's decision. It might be appropriate for the district court merely to order the Commissioner to consider the findings of the first hearing final and binding. This would avoid a time-consuming and costly duplication of the earlier hearing.

645 F.2d at 599. Thus, Rose, who had vigorously maintained that the first special education hearing was tainted

by procedural error, actually lost ground on the first appeal. Moreover, by the time the parties returned to this Court, the entire issue had been rendered moot by the Legislature's amendment of the offending section of the Nebraska act:

> The Court finds that the recent amendment of Neb. Rev.Stat. Section 43-662 and the enactment of Neb.Rev. Stat. 43-666 moot the question of whether the Nebraska statute is inconsistent with the Federal Legislation. As amended, the Nebraska statute eliminates any discretion previously vested in the Commissioner and thereby insures the integrity of the due process hearing.

Rose v. State of Nebraska, supra, 530 F.Supp. at 299. Indeed, the corrective legislation was actually signed by the Governor on March 28, 1980, more than a month before Judge Denney granted Rose's application for a preliminary injunction. The amendments became effective on July 19, 1980.

The conclusion is inescapable: although Rose prevailed at the outset of this litigation, it quickly became apparent that he had actually accomplished very little. Because this Court did not preside at the preliminary injunction hearing, it is difficult to evaluate Mr. Hughes' representation of George and Marla Rose. Nevertheless, the Court has no doubt that counsel engaged in extensive preparation and performed skillfully against a diligent and aggressive defense effort. The Court is convinced, however, that Rose achieved only limited success in pursuing his claim up through the first appeal; in light of the *Hensley* decision, Rose's fee award must therefore be reduced "in relation to the results obtained." *Hensley, supra,* 103 S.Ct. at 1943. The Court finds that the lodestar figure

of $15,900 must be reduced by forty percent (40%) to account for Rose's limited success. The defendants therefore shall pay plaintiff Rose attorney's fees of $9540.00.

B. *Fees for the Administrative Hearing.*

Plaintiff Rose also seeks attorney's fees of $12,468.69 for the efforts of counsel Michael Levy at the administrative due process hearing that preceded this suit. This claim must fail for two reasons. First, Rose was clearly not a "prevailing party" at the administrative level, and he did not challenge the hearing officer's decision on substantive grounds. Second, even if Rose had prevailed at the administrative hearing, he would still be foreclosed from receiving attorney's fees under 42 U.S.C. Section 1988. *See Horacek v. Thone,* 710 F.2d 496, 499-500 (8th Cir.1983) (Section 1988 does not provide a basis for awarding fees to parties who prevail in state administrative hearing); *cf. Derheim v. Hennepin County Welfare Board,* 688 F.2d 66 (8th Cir.1982) (Section 1988 fee request denied because administrative hearing was not a proceeding to enforce civil rights). Rose's request for attorney's fees for the Department of Education due process hearing is completely without merit and must, therefore, be denied.

C. *Costs.*

Under Rule 54(d) of the Federal Rules of Civil Procedure, certain statutory costs are awarded to prevailing parties as a "matter of course." The successful litigant must, of course, prove the nature and amount of such costs. In this case, Rose's proof is deficient in several respects. First, Rose has failed to comply with Local Rule 34 concerning the taxation and payment of costs.

Second, the only documentary proof submitted by either Rose or Monahan is an untitled, unnotarized statement of costs totalling $801.77. (*See* attachment to Filing 50). Two other figures have been mentioned during these proceedings: $890.52, in Rose's first brief to this Court, and "approximately" $850.00 in testimony by plaintiff James Monahan. Finally, the Court notes that, on April 8, 1981, the court of appeals directed that each party should bear its own costs for the first appeal. Defendants' Ex. 2 (8-18-83). It is uncertain whether the panel that heard the second appeal intended to change this order.

The court of appeals found that plaintiff Rose is entitled to an award of costs. *Monahan v. State of Nebraska, supra,* 687 F.2d at 1172. In the opinion of this Court, however, Rose has utterly failed to sustain his burden of proving the amount of awardable costs that he incurred in the prosecution of this action. The only testimony presented at the hearing was James Monahan's statement that the plaintiffs spent about $850.00 in pursuing this case through the first appeal. But Monahan was not a prevailing party for purposes of either 42 U.S.C. Section 1988 or Fed.R. Civ.P. 54(d). In view of the ambiguity created by the Eighth Circuit's order in the first appeal (Defendants' Ex. 2, *supra*) and, furthermore, because plaintiff Rose has failed to prove the amount of costs to which he is entitled, this Court believes that the parties should bear their own costs in this case.

III

CONCLUSION

This Court is painfully aware of the time and expense involved in seeking relief from a federal court. The Civil Rights Attorney's Fees Awards Act of 1976 was enacted to

lessen this substantial burden. Plaintiff Rose has conscientiously pursued a favorable resolution of this case and, to some extent, he has succeeded. Nevertheless, because of his limited success on the merits, Rose's claim for attorney's fees must be reduced. Furthermore, Rose's claim for a fee award for the administrative hearing that preceded this action must be rejected in its entirety. Finally, Rose has failed to prove the amount of statutory costs to which he is entitled. Therefore, for the reasons discussed in the foregoing Memorandum, IT IS HEREBY ORDERED:

1) that plaintiff Rose shall recover from the defendants an award of attorney's fees in the sum of $9540;

2) that Rose's motion for an award of attorney's fees and costs is, in all other respects, overruled.

Dated this 10th day of November, 1983.

BY THE COURT:

/s/ Richard E. Robinson
Senior Judge, United States
District Court

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[1]The Supreme Court adheres to a rather lenient standard for determining whether a plaintiff is a prevailing party:

> "[P]laintiffs may be considered prevailing parties if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978). This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable." Hensley v. Eckerhardt, *supra*, 103 S.Ct. at 1939 (footnote omitted).

The court of appeals rendered its decision before the Supreme Court's pronouncements in *Hensley*. It is impossible to say whether that decision would have altered the court of appeals' view that Rose is a "prevailing party" in the limited circumstances heretofore described. In any event, it is not the province of this Court to second-guess the binding decisions of a reviewing court.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 83-2678, 83-2722, 83-2723

No. 83-2678

George Rose, as next friend of Marla Rose,

Appellant,

v.

State of Nebraska, Charles Thone, Governor of the State of Nebraska, Board of Education, School District #1, Douglas County, Nebraska, Owen Knutzen, Individually, and as Superintendent of the School District #1, Douglas County, Nebraska, Dale Samuelsen, Individually, and as Assistant Superintendent in Charge of Special Education of School District #1, Douglas County, Nebraska, Anne Campbell, Commissioner of Education for the State of Nebraska, State Board of Education, Walter M. Thompson, Individually, and as a Member of the State Board of Education, Margaret Lockwood, Individually, and as a Member of the State Board of Education, Frank E. Landis, Individually, and as a Member of the State Board of Education, Don M. Lienemann, Individually, and as a Member of the State Board of Education, Dorothy Creigh, Individually, and as a Member of the State Board of Education, Arlene E. Hart, Individually, and as a Member of the State Board of Education, William C. Ramsey, Individually, and as a Member of the State Board of Education, Dorothy Beaver, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, June Bostwick, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Walter Calinger, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Pat Geringer, Individually, and as a Member of the Board of Education,

School District #1, Douglas County, Nebraska, Leo Hoffman, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Gaynelle Goodrich, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Ruth Thomas, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Frank Bogard Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Ron McGruder, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, James A. Monaghan, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, James Beutel, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Leo Kastrick, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska,

Appellees.

On Appeal and Cross-Appeals from the United States District Court for the District of Nebraska

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No. 83-2722

George Rose, as next friend of Marla Rose,

Appellee,

v.

State of Nebraska,

Appellant.

No. 83-2723

George Rose, as next friend of Marla Rose,

Appellee,

v.

Charles Thone, Governor of the State of Nebraska, Board of Education, School District #1, Douglas County, Nebraska, Owen Knutzen, Individually, and as Superintendent of the School District #1, Douglas County, Nebraska, Dale Samuelson, Individually, and as Assistant Superintendent in Charge of Special Education of School District #1, Douglas County, Nebraska, Anne Campbell, Commissioner of Education for the State of Nebraska, State Board of Education, Walter M. Thompson, Individually, and as a Member of the State Board of Education, Margaret Lockwood, Individually, and as a Member of the State Board of Education, Frank E. Landis, Individually, and as a Member of the State Board of Education, Don M. Lienemann, Individually, and as a Member of the State Board of Education, Dorothy Creigh, Individually, and as a Member of the State Board of Education, Arlene E. Hart, Individually, and as a Member of the State Board of Education, William C. Ramsey, Individually, and as a Member of the State Board of Education, Dorothy Beaver, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, June Bostwick, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Walter Calinger, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Pat Geringer, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Leo Hoffman, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Gaynelle Goodrich, Individually, and as a Member of the Board of Education, School

District #1, Douglas County, Nebraska, Ruth Thomas, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Frank Bogard, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Ron McGruder, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, James A. Monoghan, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, James Beutel, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, Leo Kastrick, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska,

Appellants.

Submitted: September 10, 1984

Filed: November 26, 1984

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and ARNOLD, Circuit Judge.

ARNOLD, Circuit Judge.

This appeal is before us for the third time. In *Monahan v. Nebraska,* 687 F.2d 1164 (8th Cir. 1982), *cert. denied,* 103 S. Ct. 1252 (1983), the second appeal, we held that the plaintiff George Rose was a prevailing party and remanded the case to the District Court "for the limited purpose of determining the proper amount of attorney's fees and costs to be awarded to the plaintiff Rose . . . ." *Id.* at 1172. The District Court, we said, was to award fees

"for services rendered before it at the preliminary-injunction stage of the case, and for services rendered before this Court on the first appeal." *Ibid.*[1] On remand, the District Court[2] made its award of fees. *Monahan v. Nebraska,* 575 F. Supp. 132 (D. Neb. 1983).

Rose appeals, claiming that he should have been awarded fees for his attorney's services in a state administrative proceeding under the Education for All Handicapped Children Act of 1975 (EAHCA), 20 U.S.C. §§1401-1461. Defendants cross-appeal, arguing, among other things, that a fee award is barred by the Eleventh Amendment and that plaintiff obtained only insignificant relief. We partly agree with the Eleventh Amendment claim and modify the District Court's award so that it will run only against the members of the State Board of Education and the Commissioner of Education. As so modified, the judgment will be affirmed.

I.

We shall restate enough of the factual and procedural background to make the issues remaining in this case intelligible. The suit was originally brought by George Rose on behalf of his handicapped child, Marla Rose. The complaint pleaded claims arising under the EAHCA; § 504 of the Rehabilitation Act of 1973, 29

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[1]For the previous history of this case, see *Monahan v. Nebraska,* 491 F.Supp. 1074 (D. Neb. 1980), *aff'd in part, vacated in part, and remanded,* 645 F.2d 592 (8th Cir. 1981), *on remand, Rose v. Nebraska,* 530 F.Supp. 295 (D. Neb. 1981).

[2]The Hon. Richard E. Robinson, Senior United States District Judge for the District of Nebraska.

U.S.C. § 794; and 42 U.S.C. § 1983. The Rehabilitation Act claim was fully disposed of on the second appeal and will not be further referred to in this opinion. The principal issue raised by the complaint that is still relevant was the validity of the Nebraska statutory procedure for administrative appeals from placement decisions made by school officials for handicapped children. The plaintiff claimed that Nebraska law as it existed when his complaint was first filed, Neb.Rev.Stat. § 43-662 (1978), gave the State Commissioner of Education the power to review conclusions by hearing officers on administrative appeals, filed by dissatisfied parents. This power of review, it was argued, conflicts with EAHCA itself, under which a decision made by an impartial hearing officer is final. The complaint also alleged that the injection of the State Commissioner of Education into the hearing process destroyed the impartiality of the proceeding, in violation of the Due Process Clause of the Fourteenth Amendment. This latter claim, constitutionally based, was the predicate for the allegation in the original complaint under 42 U.S.C. § 1983.

The District Court originally granted preliminary relief to the Roses and, on the first appeal, this Court approved the granting of some form of relief, though the cause was remanded for reconsideration of exactly what relief should be ordered. In the meantime, however, the allegedly offending provision of state law had been amended to make it clear that the Commissioner of Education could not change a decision made by a hearing officer. L.B. 855, effective July 19, 1980, now codified as Neb. Rev. Stat. § 43-662 (Cum. Supp. 1980), made this change. Largely because of the enactment of this new law, the District Court, on remand from this Court's decision on the first appeal, dismissed the complaint as moot.

On the second appeal we approved this action in the main. We held, however, that the case was not moot to the extent that Rose was claiming attorney's fees. We held that Rose had prevailed both in the District Court and on the first appeal to this Court. Although EAHCA itself contains no provision for attorney's fees, we noted that the complaint also pleaded a claim under 42 U.S.C. § 1983 based on the due-process theory described above. This constitutional, or § 1983, ground was not reached by the District Court, and will never be reached by any court in this case, because the Nebraska statute that allegedly violated the Due Process Clause has been amended. We held, however, 687 F.2d at 1172, that Rose was nevertheless entitled to a fee award.

> Where a non-fee claim is joined with a non-frivolous claim under a statute providing for the award of fees, and the plaintiff prevails with respect to his non-fee claim, thus making it unnecessary for the court to reach the § 1983 claim, an award of fees is nevertheless appropriate. See *Robert M. v. Benton*, 671 F.2d 1104 (8th Cir. 1982), a case with some similarities to the present ones.

We then remanded the cause to the District Court for the limited purpose of determining the proper amount of fees and costs to be awarded to the plaintiff Rose. As noted above, this award was to be limited to services rendered in connection with Rose's successful request for a preliminary injunction. From the District Court's order entered pursuant to this remand, the present appeals have been filed. We shall address each of the three appeals in turn.

II.

The plaintiff originally requested the District Court to award $42,870.00 in fees and costs for services rendered in court and $12,468.69 for fees and costs of the administrative hearing, or a total of $55,338.69. The District Court first carefully pared down this request by disallowing completely any compensation for services rendered in the administrative proceeding, and by limiting compensation for services rendered in court to those hours 1) expended by the only lawyer who formally appeared as counsel for Rose and 2) actually related to the obtaining of the preliminary injunction. This process resulted in a figure of 265 hours at $60.00 per hour, or a total "lodestar" amount of $15,900.00. The District Court then reduced this sum by 40% to account for the limited success of the plaintiff, 575 F. Supp. at 137. Accordingly, the award finally made was $9,540.00. This amount represents only fees. The court found that there had been a failure of proof with respect to court costs.

Rose makes a number of arguments in his appeal. We hold that they are all without merit and that only one deserves discussion. Rose argues that since EAHCA requires exhaustion of administrative remedies, he should have been awarded fees for the state administrative hearing. In support of this point he cites *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980). *Carey* held "that §§ 706(f) and 706(k) of Title VII authorize a federal-court action to recover an award of attorney's fees for work done by the prevailing complainant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII." *Id.* at 71.

We agree with defendants that *Carey* is not controlling. Here, EAHCA, the statute which requires exhaustion of state administrative remedies, is not the statute on which the fee claim is based. As noted above, and as explained in our opinion on the second appeal, the fee award is based on 42 U.S.C. § 1988, which comes into the case only because Rose alleged, in addition to his EAHCA theory, a parallel due-process-type claim under § 1983. This latter section, of course, does not require exhaustion of administrative remedies. *E.g., Patsy v. Board of Regents,* 457 U.S. 496 (1982). In *Horacek v. Thone,* 710 F.2d 496, 499 (8th Cir. 1983) (citations omitted), we held that the *Carey* reasoning was not applicable to § 1983 actions, because "unlike Title VII 'no congressional policy exists under . . . any of the civil rights statutes enumerated in § 1988, which mandates that civil rights claimants initiate their actions at the state level before an action in federal court is proper.'"

Thus, since the award of fees is premised on 42 U.S.C. § 1983, and that section does not require exhaustion of state administrative remedies, no fees are to be awarded for the state hearing. As noted, Rose has made certain other arguments as to the amount of the award, but we think they are without merit. The District Court carefully considered this matter in a thorough opinion, and there was no abuse of discretion in the method by which it arrived at the amount allowed.

III.

No. 83-2722, the second of the above-captioned appeals, is a cross-appeal by the State of Nebraska. The state contends that the Eleventh Amendment bars this suit and

the award of any attorney's fees against it. This argument was not made on the previous appeal, but the Eleventh Amendment is a limitation on the jurisdiction of the lower federal courts, and it can be raised as a defense at any time. *Edelman v. Jordan,* 415 U.S. 651, 678 (1974).

As to the State of Nebraska itself and the State Board of Education as a board, the point is well taken. "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. This jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst State School & Hosp. v. Halderman,* 104 S. Ct. 900, 908 (1984) (citations omitted). The award made by the District Court will therefore be modified so that it will not run against either the State of Nebraska or the State Board of Education as such.

IV.

No. 83-2723, the third appeal captioned above, is a cross-appeal by the defendants other than the State of Nebraska. These defendants are, in addition to the State Board of Education, which we have already discussed, the Governor, the Commissioner of Education, the members of the State Board of Education, the Douglas County School District #1, and the members and certain employees of the School District. It is argued that Eleventh Amendment protects these defendants as well, but we disagree. It has been clear ever since *Ex parte Young,* 209 U.S. 123 (1908), that suits for declaratory and injunctive relief against state officials, as opposed to the state itself or one of its agencies, are not barred by the Eleventh Amendment. These officials may have an official, good-

faith immunity against claims for damages, but that doctrine is no longer relevant here, because all claims for damages have been dismissed. The only claim remaining, the one as to which fees are being awarded, is a claim for equitable relief. See *Wood v. Strickland,* 420 U.S. 308, 315 n.6 (1975) (immunity from damages does not ordinarily bar equitable relief); *Edelman v. Jordan, supra,* 415 U.S. at 677 (federal court's remedial power, consistent with Eleventh Amendment, is limited to prospective injunctive relief and may not include retroactive award requiring payment of damages from state treasury; *but cf. Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976) (sovereign immunity does not bar Title VII backpay award against a state).

It is true enough, as defendants point out, that an award made against a state official in his or her official capacity, as is the case here, will have to be paid from state funds, either from the general treasury or from some other state revenue source. That fact, however, has never been considered sufficient to bar either prospective injunctive relief that involves the payment of money, or the award of attorney's fees to a plaintiff who has prevailed on a claim for injunctive relief. The Supreme Court has specifically held that 42 U.S.C. § 1988 authorizes attorney's fees as a part of the costs in § 1983 cases. *Hutto v. Finney,* 437 U.S. 678, 693 (1978). This is true even when the award is made against an official who is absolutely immune (as the present defendants are not) from actions for damages. *Pulliam v. Allen,* 104 S. Ct. 1970 (1984) (fee award upheld against a judge in her official capacity; fact that defendant is absolutely immune from actions for damages no bar to a fee award for the benefit of a plaintiff who has prevailed in a suit for injunctive or declaratory relief). In

short, neither the Eleventh Amendment nor any other immunity doctrine bars the fee award in this case as against defendants other than the State of Nebraska and the State Board of Education itself.

Defendants also claim, however, that the exclusivity doctrine of *Maine v. Thiboutot,* 448 U.S. 1 (1980), further elaborated in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 453 U.S. 1, 19-21 (1981), bars an award of fees against them. EAHCA, they say, is a comprehensive statute providing the exclusive remedy for handicapped students complaining of their educational placement. EAHCA does not provide for the award of fees. It therefore excludes a fee award, the argument runs, under the more general statute, § 1983.

We are not without recent guidance from the Supreme Court on this point. See *Smith v. Robinson,* 104 S. Ct. 3457 (1984). In *Smith,* the Supreme Court held that EAHCA provides the exclusive remedy for a handicapped child seeking redress under the Equal Protection Clause of the Fourteenth Amendment for failure to receive a free appropriate education. "Congress intended the [EAHCA] to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." *Id.* at 3468. An equal-protection claim brought by a handicapped child seeking the free appropriate education provided for by EAHCA, therefore could not be based on § 1983, and no fee could be awarded for such a claim.

In *Smith,* however, the plaintiff also made a due-process challenge to the partiality of the state hearing officer, just as Rose does here. The *Smith* Court found it unnecessary to decide "whether the procedural safeguards

set out in the [EAHCA] manifest Congress' intent to preclude resort to § 1983 on a due process challenge," *id.* at 3470, but language in the Court's opinion rather strongly implies that an independent due-process claim, based on § 1983, does lie under the circumstances of the case before us. The Court cites with apparent approval our opinion in *Robert M. v. Benton, supra,* and our opinion on the first appeal in the instant case, as well as the District Court's first opinion in this case. See 104 S. Ct. at 3471 n.17. As the Court explains, in such bases the whole purpose of the due-process challenge is to compel state agencies to afford the process that is constitutionally due, and "there is no indication that agencies should be exempt from a fee award where plaintiffs have had to resort to judicial relief" to obtain this process. *Ibid.* "[U]nlike an independent equal protection claim, maintenance of an independent due process challenge to state procedures would not be inconsistent with the [EAHCA's] comprehensive scheme." *Ibid.* This discussion, to be sure, is dictim, and the Court's opinion, in text, expressly refrains from resolving the issue, but the implication is rather clear that a § 1983 suit and a fee award are appropriate when a plaintiff claims that he is being denied due process because the EAHCA administrative hearing is not being impartially conducted, notwithstanding the fact that the same theory is also the basis for a claim under the EAHCA itself.

In *Smith* the Court declined to award fees, but only because the due-process theory asserted by plaintiffs was entirely separate from the substantive claim on which plaintiffs ultimately prevailed. In *Smith* plaintiffs did not seek a new hearing for themselves, but only a declaratory

judgment that state regulations did not comply with due process, and an injunction prohibiting the State Commissioner of Education from conducting further hearings under these regulations. Here, on the other hand, Rose's due-process claim was squarely based on the same set of facts as to which he prevailed under the EAHCA. That is, Rose sought a second hearing for herself, unlike plaintiffs in *Smith*. In fact, in the instant case, plaintiff's motion for certification of a class was specifically denied, and injunctive relief was also denied "to the extent that the request seeks protection for persons not named in this lawsuit." *Monahan v. Nebraska*, 491 F. Supp. at 1080. When, in the course of our opinion on the second appeal, we directed that fees be awarded to Rose, we of course were without the benefit of the Supreme Court's opinion in *Smith*. Now, having studied that opinion, we still believe that a fee award to Rose is appropriate.

Next, defendants argue that a fee award is precluded by *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983), another case decided since the second appeal in the instant case. *Hensley* holds that the most significant factor to be considered in awarding fees to a prevailing plaintiff is the degree of success obtained. We quite agree with defendants that *Hensley* prohibits a full fee award here, and, in fact, the District Court reduced substantially the "lodestar" figure, citing *Hensley* as its authority for doing so. The District Court's opinion fully explains the reasons for its reduction of the award, and, although the 40% reduction might conceivably have been either greater or less, we see no abuse of discretion in the District Court's approach. Nor can we agree with defendants that *Hensley* compels a conclusion that Rose is not a prevailing party.

The *Hensley* standard for determining when a party has prevailed is a generous one, and a plaintiff who has obtained any significant relief is considered a prevailing party for purposes of § 1988. See, *e.q., Fast v. School District of the City of Ladue,* 728 F.2d 1030 (8th Cir. 1984) (en banc). Here, for the reasons fully explained in our opinion on the second appeal and in the District Court's most recent opinion, plaintiff is a prevailing party, though the limited nature of the relief obtained does justify a substantial reduction in the "lodestar" figure.

Finally, we agree with defendants that special circumstances make a fee award unjust against either the Governor or the local school district, Douglas County School District #1. As far as we can tell, the Governor has had no personal involvement in this matter at all. There was no good reason for him to be made a defendant, and no reason for a fee award to be made against him. The School District was a necessary defendant, but in the special circumstances of this case, we believe that no fee award should be made against it. Other parties, the Commissioner of Education and the members of the State of Board of Education, are in the case, and a fee award against them will fully compensate the plaintiff to the extent required by law. The local school district did only what it reasonably believed was compelled by state law. It was the involvement of the Commissioner of Education in the later administrative stages of the case, not anything done by the local school district, that provided the basis for plaintiff's successful claim that the state administrative process conflicted with federal law. Normally, a state official carrying out state law found unconstitutional is liable for fees under § 1988, but here other state officials

are present in the case with a much more direct connection to the very part of state process that raised the federal-law issue on which plaintiff prevailed. We believe that an award of fees against the local school district is unnecessary to vindicate plaintiff's federal rights.

V.

The judgment of the District Court is modified so that no fee award is made as against the State of Nebraska, the State Board of Education as a board, the Governor of Nebraska, or the Douglas County School District #1. The award of fees in the amount of $9,540.00 against the Commissioner of Education in her official capacity and the members of the State Board of Education in their official capacities is affirmed. Each side will bear its own costs on this appeal, and no fees will be awarded to either side for services rendered on this appeal.

It is so ordered.[3]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[3]Defendants spend a good portion of their briefs arguing that our decision on the second appeal, directing a fee award to the plaintiff Rose, was incorrect. This decision is the law of the case, and we decline to reexamine it. We note that defendants did not seek Supreme Court review, though plaintiffs did, without success. See *Rose v. Nebraska*, 103 S. Ct. 1252 (1983).

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

Nos. 83-2678, 83-2722 and 83-2723-NE.

George Rose, etc.,

Appellant/Cross-Appellee,

vs.

State of Nebraska, et al.,

Appellees/Cross-Appellants.

Appeals from the United States District Court
for the District of Nebraska.

It is now here ordered by the Court that motion of appellees/cross-appellants to stay issuance of mandate pending certiorari proceedings is denied.

December 20, 1984

APPENDIX L

Neb.Rev.Stat. § 79-325 (Reissue 1981)

State Board of Education; members; officers; Commissioner of Education; appointment; term; removal; seal; powers. The State Board of Education shall elect from its own membership a president and a vice president, and otherwise organize itself for the conduct of business. It shall then consider the appointment of a Commissioner of Education whose appointment shall be at the pleasure of the board. During such term the commissioner may be removed from office for the causes set forth in subdivision (2) of section 79-328. The commissioner shall be the secretary of the board. The board shall reorganize itself each two years at its first meeting in the next calendar year following a general election. The board shall constitute a body corporate, to be known as the State Board of Education and as such it shall adopt and make use of a common seal and may receive, hold, and use money and real and personal property for the benefit of the school system of the state.

APPENDIX M

Neb. Const. Art. VII, sec. 3

State Board of Education; members; election; manner of election; term of office. The State Board of Education shall be composed of eight members, who shall be elected from eight districts of substantially equal population as provided by the Legislature. Their term of office shall be for four years each. Their duties and powers shall be prescribed by the Legislature, and they shall receive no compensation, but shall be reimbursed their actual expense incurred in the performance of their duties. The members of the State Board of Education shall not be actively engaged in the educational profession and they shall be elected on a nonpartisan ballot. (Amended, 1972.)

Neb. Const. Art. VII, sec. 4

Board of Education; Commissioner of Education; appointment; powers; duties. The State Board of Education shall appoint and fix the compensation of the Commissioner of Education, who shall be the executive officer of the State Board of Education and the administrative head of the State Department of Education, and who shall have such powers and duties as the Legislature may direct. The board shall appoint all employees of the State Department of Education on the recommendation of the Commissioner of Education. (Amended, 1966, 1972.)